

Readings in American constitutional history, 1776-1876

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READINGS IN AMERICAN CONSTITUTIONAL HISTORY

1776-1876

EDITED BY

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PREFACE

IN preparing this collection of historical material for publication, I have had in mind chiefly the needs of the average undergraduate. Believing that the so-called "case system" has a distinct disciplinary value and may be applied profitably, within certain limits, to the study of constitutional history, I have tested for some years in my classes a variety of documents drawn from many sources. The matter contained within the covers of this volume may be viewed as the survival of the fittest. So far as possible, a unity and coherence have been given to the selections by careful grouping and by brief introductory comments.

The phrase "constitutional history" has been used rather broadly to mean not only the development of Federal and State Constitutions, but also the history of governmental processes. "Readings in the history of American polity" would have been a not inappropriate title for the book.

Formal documentary matter — such as legislative bills, acts, and general statutes — has been omitted. Selected statutes are now accessible in several collections, notably in the excellent series edited by Professor William MacDonald. In conclusion, I will say that wherever a choice has been possible, I have selected material with an eye to literary form as well as to historical content.

A. J.

YALE UNIVERSITY

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PART ONE. FOUNDATIONS OF AMERICAN POLITY

CHAPTER I

COLONIAL CHARTERS AND ESTABLISHMENTS

AT the outbreak of the Revolution there were two types of colonial establishment in British North America: the province and the corporate colony. Of the latter only Connecticut and Rhode Island survived the repeated attacks of the royal government. Both had received charters from King Charles Second, creating them corporations on the place. A happy combination of circumstances had secured legal recognition of the governmental organizations already existing. Both colonies, therefore, could continue their development as self-governing communities, with practically no interference from the Crown. Extracts from the Connecticut charter indicate the nature of the government. There were two kinds of provinces: the proprietary and the royal. The charter given to Lord Baltimore is an example of the proprietary grant. A royal province may be defined as one in which the King is his own proprietor, retaining both governmental and territorial powers. Maryland and Pennsylvania with Delaware were the only proprietary provinces left after the middle of the eighteenth century. New Hampshire, New York, New Jersey, the Carolinas, and Georgia had reverted to the Crown and become royal provinces.

1. *The Charter of Connecticut — 1662.*¹

CHARLES THE SECOND, [&c.] Whereas, . . . We have byn informed by the humble Petition of our Trusty and welbeloved John Winthrop, [and others] . . . that the same Colony or the greatest parte thereof was purchased and obteyned for greate and valuable considerations, And some other parte thereof gained by Conquest and with much difficulty, and att the onely endeavours, expence and Charge of them and their Associates, and those under whome they Clayme, Subdued

¹ *Connecticut Colonial Records*, II, 3-11.

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and improved, and thereby become a considerable enlargement and addition of our Dominions and interest there, — NOW KNOW YEA, that . . . WEE HAVE thought fitt . . . to Create and Make them a Body Pollitique and Corporate, with the powers and Priviledges herein after mentioned; And accordingly WEE . . . by theis presents . . . DOE Ordeine, Constitute and Declare That they, the said John Winthrop . . . [and others] . . ., and all such others as now are or hereafter shall bee Admitted and made free of the Company and Society of our Collony of Conecticut in America, shall . . . bee one Body Corporate and Pollitique in fact and name, by the Name of Governour and Company of the English Collony of Conecticut in New England in America; . . . AND further, wee . . . DOE Declare and appoint, that for the better ordering and manageing of the affaires and businesse of the said Company and their Sucessors, there shall be one Governour, one Deputy Governour and Twelve Assistants, to bee from tyme to tyme Constituted, Elected and Chosen out of the Freemen of the said Company for the tyme being, in such manner and forme as hereafter in these presents is expressed; which said Officers shall apply themselves to take care for the best disposeing and Ordering of the Generall busines and affaires of and concerning the lands and hereditaments herein after mentioned to bee graunted, and the Plantation thereof and the Government of the People thereof. And . . . WEE DOE . . . Constitute and appoint the aforesaid John Winthrop to bee the first and present Governour of the said Company; And the said John Mason to bee the Deputy Governour; And the said Samuell Willis, [and others] . . . to bee the Twelve present Assistants of the said Company; to contynue in the said severall Offices respectively untill the second Thursday which shall bee in the Moneth of October now next coming. AND further, wee . . . DOE Ordaine and Graunt that the Governour of the said Company for the tyme being, or, in his absence by occasion of sicknes, or otherwise by his leave or permission, the Deputy Governour for the tyme being, shall and may from tyme to tyme upon all occasions give Order for

the assembling of the said Company and calling them together to Consult and advise of the businesse and Affaires of the said Company, And that for ever hereafter, Twice in every yeare, (That is to say,) on every second Thursday in October and on every second Thursday in May, or oftener, in Case it shall be requisite, The Assistants and freemen of the said Company, or such of them (not exceeding twoe Persons from each place, Towne or Citty) whoe shall bee from tyme to tyme thereunto Elected or Deputed by the major parte of the freemen of the respective Townes, Cittyes and Places for which they shall bee soe elected or Deputed, shall have a generall meeting or Assembly, then and their to Consult and advise in and about the Affaires and businesse of the said Company; And that the Governour, or . . . Deputy Governour . . ., and such of the Assistants and freemen of the said Company as shall be soe Elected or Deputed and bee present att such meeting or Assembly, or the greatest number of them, whereof the Governour or Deputy Governour and Six of his Assistants, at least, to bee Seaven, shall be called the Generall Assembly, and shall have full power and authority to alter and change their dayes and tymes of meeting or Generall Assemblies for Electing the Governour, Deputy Governour and Assistants or other Officers, or any other Courts, Assemblies or meetings, and to Choose, Nominate and appoint such and soe many other Persons as they shall thinke fitt and shall bee willing to accept the same, to bee free of the said Company and Body Politique, and them into the same to Admitt and to Elect, and Constitute such Officers as they shall thinke fitt and requisite for the Ordering, mannageing and disposeing of the affaires of said Governour and Company and their Successors. AND WEE DOE hereby . . . Establish and Ordeine, that once in the yeare . . ., namely, the said Second Thursday in May, the Governour, Deputy Governour and Assistants of the said Company and other Officers of the said Company, or such of them as the said Generall Assembly shall thinke fitt, shall bee, in the said Generall Court and Assembly to bee held from that day or tyme, newly Chosen for the yeare ensuing, by such

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greater part of the said Company for the tyme being then and there present. . . .

2. *Defense of Charter Governments.*¹

The other Charge in the Bill is, *That they have exercised arbitrary Power*. If this be aimed at the Proprietary Governments, which however I don't accuse, I have nothing to say, but am sure that the Charter Governments stand clear of it. The Thing speaks loudly for itself. For in the Governments, where there are Charters and those Charters entire, all Officers Civil and Military are elected by the People, and that annually; than which Constitution nothing under Heaven can be a stronger Barrier against arbitrary Rule. For should it be allowed, that the People, *corrupted* or *deceived*, might instead of wise Magistrates chuse Tyrants and Oppressors to Lord over them one Year; yet it can't be imagined, that after they have felt the Smart of it, they will do so the next. Nor can there be a greater Obligation on the Rulers themselves to administer Justice, than that their Election depends on it the next Year. Hence the frequent Choice of Magistrates has bin ever a main Pillar, upon which all who have aim'd at Freedom in their Schemes of Government, have depended.

AS the Reason is incontestable, so the Fact is apparent, that these Governments, far from retrenching the Liberty of the Subject, have improved it in some important Articles, which the Circumstances of Things in *Great Britain* perhaps don't require, or won't easily admit.

To instance in a few: There has bin from the beginning an Office erected by Law in every Country, where all Conveyances of Land are enter'd at large, after the Grantors have first acknowledg'd them before a Justice of Peace; by which means much Fraud is prevented, no Person being able to sell his Estate twice, or take up more Money upon it than it's worth. Provision has likewise bin made for the Security of the Life and Property of the Subject in the Matter of Juries, who are not returned by the Sherriff of the County, but are chosen

¹ Jer. Dummer, *Defence of the New-England Charters* (1721), 35-39.

by the Inhabitants of the Town a convenient Time before the sitting of the Courts. And this Election is under the most exact Regulation, in Order to prevent Corruption, so far as Humane Prudence can do it. It must be noted, that Sherriffs in the Plantations are comparatively but little Officers, and therefore not to be trusted as here, where they are Men of ample Fortunes. And yet even here such flagrant Corruptions have bin found in returning Juries by Sherriffs, that the House of Commons thought it necessary in their last Session to amend the Law in this Point, and pass'd a Bill for choosing them by Ballot.

REDRESS in their Courts of Law is *easy, quick, and cheap*. All Processes are in *English*, and no special Pleadings or Demurrers are admitted, but the general Issue is always given, and special Matters brought in Evidence; which saves Time and Expençe; and in this Case a Man is not liable to lose his Estate for a Defect in Form, nor is the Merit of the Cause made to depend on the Niceties of Clerkship. By a Law of the Country no Writ may be abated for a circumstantial Error, such as a slight Mis-nomer or any Informality. And by another Law, it is enacted, that every Attorney taking out a Writ from the Clerk's Office, shall indorse his Sirname upon it, and be liable to pay to the adverse Party his Costs and Charges in Case of Non-Prosecution or Discontinuance, or that the Plaintiff be Nonsuit, or Judgment pass against him. And it is provided in the same Act, That if the Plaintiff shall suffer a Nonsuit by the Attorney's mis-laying the Action, he shall be obliged to draw a new Writ without a Fee, in case the Party shall see fit to revive the Suit. I can't but think that every Body except Gentlemen of the long Robe and the Attornies, will think this a wholesome Law, and well calculated for the Benefit of the Subject. For the quicker Dispatch of Causes, Declarations are made Parts of the Writ, in which the Case is fully and particularly set forth. If it be a matter of Account, the Account is annexed to the Writ, and Copies of both left with the Defendant; which being done Fourteen Days before the Sitting of the Court, he is oblig'd to plead directly, and the

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Issue is then tried. Whereas by the Practice of the Court of *King's Bench*, Three or Four Months Time is often lost after the Writ is served, before the Cause can be brought to Issue.

'Nor are the People of *New England* oppressed with the infinite Delays and Expence that attend the Proceedings in *Chancery*, where both Parties are often ruined by the Charge and Length of the Suit. But as in all other Countries, *England* only excepted, *Jus & Aequum* are held the same, and never divided; so it is there: A Power of *Chancery* being vested in the Judges of the Courts of Common Law as to some particular Cases, and they make equitable Constructions in Others. I must add, that the Fees of Officers of all sorts are settled by Acts of Assembly at moderate Prices, for the Ease of the Subject. . . .

3. *The Charter of Maryland—1632.*¹

CHARLES, by the grace of GOD, of *England, Scotland, France, and Ireland*, **KING**, Defender of the Faith, &c. TO ALL to whom these Presents shall come, GREETING.

II. WHEREAS our well beloved and right trusty Subject CAECILIUS CALVERT, . . . hath humbly besought Leave of Us, that he may transport, by his own Industry, and Expence, a numerous Colony of the *English Nation*, to a certain Region, herein after described, . . . and that all that Region . . . be given, granted, and confirmed unto him, and his Heirs.

III. KNOW YE therefore, that WE, . . . by this our present CHARTER . . . do GIVE, GRANT, and CONFIRM, unto the aforesaid CAECILIUS, now Baron of *BALTIMORE*, his Heirs, and Assigns, all that Part of the Peninsula . . . [etc., boundaries defined.]

IV. Also WE DO GRANT . . . unto the said Baron of *BALTIMORE*, . . . all Islands and Islets within the Limits aforesaid . . .; And furthermore the PATRONAGES, and ADVOWSONS of all Churches which (with the increasing Worship and Religion of CHRIST) within the said Region . . ., hereafter shall happen to be built, together with Licence and Fac-

¹ Thomas Bacon, *Laws of Maryland* (1765).

ulty of erecting and founding Churches, Chapels, and Places of Worship, in convenient and suitable Places, within the Premises, and of causing the same to be dedicated and consecrated according to the Ecclesiastical Laws of our Kingdom of *England*, with all, and singular such, and as ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and royal Rights, and temporal Franchises whatsoever, as well by Sea as by Land, within the Region . . . aforesaid, to be had, exercised, used, and enjoyed, as any Bishop of *Durham*, within the Bishoprick or County Palatine of *Durham*, in our Kingdom of *England*, ever heretofore hath had, held, used, or enjoyed, or of Right could, or ought to have, hold, use, or enjoy.

V. And WE do by these Presents . . . MAKE, CREATE and CONSTITUTE HIM, the now Baron of *BALTIMORE*, and his Heirs, the TRUE and ABSOLUTE LORDS and PROPRIETARIES of the Region aforesaid, and of all other the Premises (except the before excepted) saving always the Faith and Allegiance and Sovereign Dominion due to US . . . ; TO HOLD of US . . . as of our Castle of *Windsor*, in our County of *Berks*, in free and common SOCCAGE, by Fealty only for all Services, and not *in capite*, nor by Knight's SERVICE, YIELDING therefore unto US . . . two INDIAN ARROWS of those Parts, to be delivered at the said Castle of *Windsor*, every Year, on Tuesday in Easter-Week: And also the fifth Part of all Gold and Silver Ore. which shall happen from Time to Time, to be found within the aforesaid limits.

VI. Now, That the aforesaid Region, thus by us granted and described, may be eminently distinguished above all other Regions of that Territory, and decorated with more ample Titles, . . . WE do . . . ERECT and INCORPORATE the same into a PROVINCE, and nominate the same MARYLAND, by which name WE will that it shall from henceforth be called.

VII. And forasmuch as WE have above made and ordained the now Baron of *BALTIMORE*, the true Lord and *Proprietary* of the whole PROVINCE aforesaid, . . . WE . . . do grant unto the said now Baron, . . . and to his Heirs, for the good

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and happy Government of the said PROVINCE free, full, and absolute Power, by the tenor of these Presents, to Ordain, Make and Enact LAWS, of what kind soever, according to their sound Discretions, whether relating to the Public State of the said PROVINCE, or the private Utility of Individuals, of and with the Advice, Assent, and Approbation of the Free-Men of the same PROVINCE, or of the greater Part of them, or of their Delegates or Deputies, whom WE will shall be called together for the framing of LAWS, when, and as often as Need shall require, by the aforesaid now Baron of *BALTIMORE*, and his Heirs, and in the Form which shall seem best to him or them, and the same to publish under the Seal of the aforesaid now Baron of *BALTIMORE*, and his Heirs, and duly to execute the same upon all Persons, for the Time being, within the aforesaid PROVINCE, and the Limits thereof, or under his or their Government and Power, . . . by the Imposition of Fines, Imprisonment, and other Punishment whatsoever; even if it be necessary, and the Quality of the Offence require it, by Privation of Member, or Life . . .: And also to Remit, Release, Pardon, and Abolish, all Crimes and Offences whatsoever against such Laws, whether before, or after Judgment passed: . . . So NEVERTHELESS, that the Laws aforesaid be consonant to Reason and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the Laws, Statutes, Customs and Rights, of this Our Kingdom of *England*.

VIII. And FORASMUCH as, in the Government of so great a PROVINCE, sudden Accidents may frequently happen, to which it will be necessary to apply a Remedy, before the Freeholders of the said PROVINCE, their Delegates, or Deputies, can be called together for the framing of Laws; neither will it be fit that so great a Number of People should immediately, on such emergent Occasion, be called together, WE THEREFORE, . . . do grant . . . that the aforesaid now Baron of *BALTIMORE*; and his Heirs, . . . may, and can make and constitute fit and wholesom Ordinances from Time to Time, to be kept and observed within the PROVINCE aforesaid, . . . and publickly to notify the same to all Persons whom the same in any wise

do or may affect . . .: so that the same Ordinances do not, in any Sort, extend to oblige, bind, change, or take away the Right or Interest of any Person or Persons, of, or in Member, Life, Freehold, Goods or Chattels.

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 XVII. MOREOVER, We will, appoint, and ordain, and by these Presents, for US, our Heirs and Successors, do grant . . . that the same Baron of *BALTIMORE*, his Heirs and Assigns, from Time to Time, forever, shall have, and enjoy the Taxes and Subsidies payable, or arising within the Ports, Harbours, and other Creeks and Places aforesaid, with[in] the PROVINCE, aforesaid, for Wares bought and sold, and Things there to be laden, or unladen, to be reasonably assessed by them, and the People there as aforesaid, on emergent Occasion; to whom WE grant Power by these Presents, for US, our Heirs and Successors, to assess and impose the said Taxes and Subsidies there, upon just Cause, and in due Proportion.

XVIII. AND FURTHERMORE . . ., WE . . . do give . . . unto the aforesaid now Baron of *BALTIMORE*, his Heirs, and Assigns, full and absolute Licence, Power, and Authority . . . [to] assign, alien, grant, demise, or enfeoff so many, such, and proportionate Parts and Parcels of the Premises, to any Person or Persons willing to purchase the same, as they shall think convenient, to have and to hold . . . in Fee-simple, or Fee-tail, or for Term of Life, Lives, or Years; to hold of the aforesaid now Baron of *BALTIMORE*, his Heirs and Assigns, by . . . such . . . Services, Customs and Rents OF THIS KIND, as to the same now Baron of *BALTIMORE*, his Heirs and Assigns, shall seem fit and agreeable, and not immediately of US.

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CHAPTER II

THE POLITY OF A ROYAL PROVINCE

SEVEN of the original colonies — eight, if Massachusetts be included — were royal provinces when they declared their independence. Although Massachusetts had a royal governor, its elective council gave the government a somewhat anomalous character. Among the duties repeatedly enjoined upon the royal governor was that of reporting upon the state of his province. The following extracts from reports by the governors of New York and Virginia give a substantially correct account of these two provincial establishments.

4. *Report of Governor Tryon on New York.*¹

By the Grants of this Province and other Territories to the Duke of York in 1663-4 and 1674, the powers of Government were vested in him, and were accordingly exercised by his Governors until he ascended the Throne when his Rights as Proprietor merged in his Crown, and the Province ceased to be a charter Government.

From that time it has been a Royal Government, and in its Constitution nearly resembles that of Great Britain and the other Royal Governments in America. The Governor is appointed by the King during his Royal Will and pleasure by Letters Patent under the Great Seal of Great Britain with very ample powers. He has a Council in Imitation of His Majesty's Privy Council. — This Board when full consists of Twelve Members who are also appointed by the Crown during Will & Pleasure; any three of whom make a Quorum — The Province enjoys a Legislative Body, which consists of the Governor as the King's Representative; the Council in the place of the House of Lords, and the Representatives of the People, who are chosen as in England: Of these the City of New York sends four. — All the other Counties (except the New Counties of

¹ O'Callaghan, *Documentary History of the State of New York*, 1, 752-56. June 11, 1774.

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Charlotte & Gloucester as yet not represented) send Two. — The Borough of Westchester, the Township of Schenectady and the three Manors of Rensselaerwyck, Livingston and Cortlandt each send one; in the whole forming a Body of Thirty one Representatives.

The Governor by his Commission is authorized to convene them with the advice of the Council, and adjourn, prorogue or dissolve the General Assembly as he shall judge necessary.

This Body has not the power to make any Laws repugnant to the Laws and Statutes of Great Britain. All Laws proposed to be made by this Provincial Legislature, pass thro' each of the Houses of Council and Assembly, as Bills do thro' the House of Commons and House of Lords in England, and the Governor has a Negative voice in the making and passing of all such Laws. Every Law so passed is to be transmitted to His Majesty under the Great Seal of the Province, within Three months or sooner after the making thereof and a Duplicate by the next conveyance, in order to be approved or disallowed by His Majesty; And if His Majesty shall disallow any such Law and the same is signified to the Governor under the Royal Sign Manual or by Order of his Majesty's Privy Council, from thenceforth such law becomes utterly void. — A law of the Province has limited the duration of the Assembly to seven years.

The Common Law of England is considered as the Fundamental law of the Province and it is the received Doctrine that all the Statutes (not Local in their Nature, and which can be fitly applied to the circumstances of the Colony) enacted before the Province had a Legislature, are binding upon the Colony, but that Statutes passed since do not affect the Colony, unless by being specially named, such appears to be the Intentions of the British Legislature.

The Province has a Court of Chancery in which the Governor or Commander in chief sits as Chancellor and the Practice of the Court of Chancery in England is pursued as closely as possible. The officers of this Court consist of a Master of the Rolls newly created — Two Masters. — Two Clerks in Court. — A Register. — An Examiner, and a Serjeant at Arms.

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Of the Courts of Common Law the Chief is called the Supreme Court. — The Judges of which have all the powers of the King's Bench, Common Pleas and Exchequer in England. This Court sits once every three months at the City of New York, and the practice therein is modelled upon that of the King's Bench at Westminster. — Tho' the judges have the powers of the Court of Exchequer they never proceed upon the Equity side. — The court has no Officers but one Clerk, and is not organized nor supplied with any officers in that Department of the Exchequer, which in England has the care of the revenue. — The judges of the Supreme Court hold their offices during the King's Will and Pleasure and are Judges of Nisi prius of Course by act of Assembly, & Annually perform a Circuit through the Counties. — The Decisions of this Court in General are final unless where the Value exceeds £300. Sterling, in which case the subject may be relieved from its errors *only* by an application to the Governor & Council, and where the Value exceeds £500 sterling an appeal lies from the Judgment of the latter to His Majesty in Privy Council.

By an Act of the Legislature of the Province suits are prohibited to be brought in the Supreme Court where the Value demanded does not exceed £20. Currency.

The Clerk's Office of the Supreme Court has always been held as an Appendage to that of the Secretary of the Province.

There is also in each County an Inferior Court of Common Pleas, which has the Cognizance of all actions real, personal & mixed, where the matter in demand is above £5. in value. — The practice of these Courts is a mixture between the Kings Bench and Common Pleas at Westminster. — Their Errors are corrected in the first Instance by Writ of Error brought into the Supreme Court; and the Judges hold their offices during pleasure. — The Clerks of these Courts also hold their offices during pleasure and are appointed by the Governor, except the Clerk of Albany who is appointed under the King's Mandate.

Besides these Courts the Justices of peace are by Act of Assembly empowered to try all causes to the amount of £5.

Currency, (except where the Crown is concerned or where the Title of Lands shall come into Question; — and Actions of Slander) but the parties may either of them demand a jury of Six Men. — If wrong is done to either party, the person injured may have a Certiorari from the Supreme Court, tho' the remedy is very inadequate.

The Courts of Criminal Jurisdiction are Correspondent to those in England. — The Supreme Court exercises it in the City of New York, as the King's Bench does at Westminster. — The Judges when they go the Circuit have a Commission of Oyer and Terminer and General Gaol Delivery; and there are Courts of Sessions held by the Justices of the peace; the powers of which and their proceedings correspond with the like Courts of England. — The Office of Clerk of the Sessions, is invariably connected with that of the Clerk of the Inferior Court of Common Pleas in the respective Counties.

By acts of the Provincial Legislature the Justices of the Peace have an extraordinary Jurisdiction with respect to some offences by which any three Justices (one being of the Quorum) where the offender does not find Bail in 48 Hours after being in the Custody of the Constable, may try the party without any [. . .] or a jury, for any offence under the Degree of Grand Larceny; and inflict any punishment for these small offences at their Discretion, so that it exceeds (qy? extends) not to Life or Limb. — And any three Justices of the Peace (one being of the Quorum) and Five Freeholders have power without a Grand or Petty Jury to proceed against and try in a Summary Way, Slaves offending in certain cases, and punish them even with death.

The Duty of His Majesty's Attorney General of the Province is similar to the Duty of the Officer in England, and the Master of the Crown Office: He is appointed by the Crown during Pleasure, and His Majesty has no Sollicitor General nor Council in the Province, to assist the Attorney General upon any Occasion.

There are two other Courts in the Province. The Court of Admiralty which proceeds after the Course of the Civil Law

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in matters within its Jurisdiction, which has been so enlarged by divers Statutes as to include almost every breach of the Acts of Trade. — From this Court an appeal lies to a Superior Court of Admiralty, lately Established in North America by Statute; before this Establishment an appeal only lay to the High Court of Admiralty of England.

The Prerogative Court concerns itself only in the Probate of wills and in matters relating to the Administration of the Estates of Intestates and granting Licences of Marriages. The Governor is properly the Judge of this Court but it has been usual for him to act in general by a Delegate.

The Province is at present divided into fourteen Counties, viz — The City and County of New York — The County of Albany — Richmond (which comprehends the whole of Staten Island) Kings, Queens and Suffolk (which include the whole of Nassau or Long Island) Westchester, Dutches, Ulster, Orange, Cumberland, Gloucester, Charlotte and Tryon. — For each of these Counties a Sheriff and one or more Coroners are appointed by the Governor who hold their offices during pleasure.

As to the Military power of the Province, the Governor for the time being is the Captain General and Commander in Chief and appoints all the Provincial Military officers during pleasure.

5. *Report of Governor Gooch on Virginia.*¹

The Const. of ye Gov't. resembles Gt. Britn. as near as may be: 1st in the Point of Legislature ye Govr. in Place of ye Kg. has the Power of calling, Prorogueing or disolv'g Gen. Assemblies wch represent ye Parliament. This Assembly consists of 2 Houses. Ye upper is composed only of ye council in number 12, who are of ye Principal Gentlemen of ye Country, & who are supplied from time to time (in vacancies) by Ks nomination under his sign manual. The lower House ye House of Burgeses is composed of Representatives chosen by ye majority

¹ "Queries from ye Lds of Trade to Sr Wm. Gooch Govr of Virginia & his Answers Abridged," in *Virginia Magazine of History*, III, 114-17. I have edited the text freely, in order to make intelligible certain abbreviations, like H of B, Chan., N.N., etc.

of ye Freeholders, two in each county. One for Wmsburgh, one for Norfolk, one for Ja'stown & ye Coll. Wee have now including ye North Neck 44 Counties, which makes ye number of Burgesses 92. All Bills for laying duties on Commodities & Taxes on the people take rise in ye House of Burgesses, and generally all Bills prepared on petitions or Representations of ye People are first moved there; but either House may frame Bills as they find most expedient for ye publick service. The Bills pass through ye like Forms as in Parliament, & when passed both Houses are enrolled for ye Govrs assent commonly given ye last day of the session.

But ye Govr has a negative & may reject any bill he thinks fitt. For ye administration of Justice there are held monthly Courts in each County by persons commissioned by ye Govr, who not only have ye power of Justices of ye Peace but have cognizance of all suits of wht value soever arising within their respective Jurisdictions, both at common Law & Chancery: excepting only such criminal offences as are punishable by loss of Life or Member. For ye city of Wms there is also a Court of Hustins, held monthly before ye mayor & aldn for tryal of all suits at Common Law arising wth in town & not exceeding 20£ or its value. Ye same for Norfolk. There are ye Inferior Courts of ye Govmt & from these Appeal lies in ye gl Ct. appellt givg security to Prosect wth effect.

The General Court consists of ye Govr & Council, any 5 of whom make a Quorum. This Court hath Jurisdiction of all Causes Real, Pers'l & mixt at Common Law bro't thither originally not under £10 ster; or by appeal or superseds (wch in ye nature of a writ of error) from ye Inferiour Courts. All criminal offences are here tryable & it is also a Court of Chancery for matters of a great value but by act of A. as appeal lies from an Inferior Court unless ye Debt, Damage or thing in Demand Exclusive of Costs exceed ye value of £5, excepting only wch the Titles or Bounds of Land are in question, and appeals lie to King in Council for £300 ster. or upwards. There are two Courts of Oyer and Terminer held yearly ye 2nd Tuesday in June, & Xs for trying all criminals yt happen to be com-

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mitted after the respective General Courts. Ye Judges here are only such as are members of ye Council & sitt by ye Govrs commission pursuant to his Majesty's Instructn. For punishing slaves for capitl Crimes a commission of Oyer and Terminer issues from ye Gr. to ye Justices of ye County where ye offence is committed by proof of Evidence without any Jury, & on convictions they award exn & set a value on ye slave, which is afterwards paid to ye owner by ye General Assembly as an encouragement to People to discover ye villanies of their slaves. For breaches of the act of Trade & for determining controversies concerning salvage, mariner's wages & other maritime affairs, there is a Court of admiralty held before a Judge constituted under ye Seal of ye high Cot. of admty. of Great Britain; to this Cot belong an advocate, a Register & Marshal appointed by ye Govr. who is also a * * vice admiral of all ye Seas, Rivrs, Creeks & Coasts within his Govmt. This Court is only held as occasion requires & an appeal lyes to ye K. Council. The Govr has also a Comn for trying Pirates.

There is also a Cot. of ye commissary of ye Ld. Bp. of Londn wch only meddles with the Punishment of the Immors of ye Clergy, & proceeds by monition, suspension or Deprivation according to the offence & an appeal lyes to the Delegates appd. by Ks. Com. in England.

The Governour is invested with a Power Pardoning all Crimes except Treason & willful Murder, & in these he has a Power of suspending ye execun by reprieve till his Majs Pleasure is known. The Govr. can remitt all fines & Forfeitures accruing to ye Crown to ye value of £10 ster. & if above he may suspend the levying till ye Ks pleasure be known. But the inhabitants of ye N. Neck are to be excepted ye Proprietor whereof has by his Charter all the Fines & Forfeitures Felons good & deodances within the Limits of his Grant.

For matters of State there is a Council appointed by ye K. to be assist. with their advice to ye Govr. in all things touching his Majs service viz. the disposing of his Lands, managemt. of his Revenue, nominating or Removl of Js of Peace, Sheriffs, coroners, or other officers of trust who receive ye Comn from

ye Govr. for ye better ordering the tributary Indians & making War or Peace with foreign Indians & various other Matters wch concern the Publick Quiet of ye Govt & do not fall under the direction of Positive Laws. There is no Sallary annexed to this office, but as the Council compose the upper House of Assembly & are also Judges of the General Court there is an appt. of £600 p an. out of ye settled Revenue wch is proprt. & divided among them according to their respective attendce on these two Services. And such of them as attend at the Court of Oyer & Terminer have their Proportion of £100 allowed out of ye Revenue for each Court.

CHAPTER III

THE POWERS OF A ROYAL GOVERNOR

THE royal provinces — Massachusetts excepted — had no charters. The formal powers of the governor were laid down in his commission. More specific duties were enjoined upon him in the instructions which accompanied his commission or were sent out from time to time. In all the provinces the theoretical authority of the governor was in practice greatly circumscribed by the extraordinary development of representative assemblies. The sharp injunctions of the instructions bear witness to colonial practices which often thwarted the purposes of the Crown.

6. Commission of Francis Bernard as Governor of New Jersey — 1758.¹

GEORGE THE SECOND by the Grace of God, of Great Britain, France and Ireland King, Defender of the Faith, &c.

To Our trusty and Wellbeloved Francis Bernard Esq^r. Greeting: We reposing especial Trust and Confidence in the Prudence, Courage and Loyalty of you the said Francis Bernard, of our especial Grace certain Knowledge and meer motion, have thought fit to constitute and appoint, and by these Presents do constitute and appoint you . . . to be Our Capⁿ General and Governor in Chief in & over Our Province of Nova Cæsarea or New Jersey, Viz: the Division of East and West New Jersey in America, which we have thought fit to reunite into one Province and settle under one entire Government.

And We do hereby require and command you to do and execute all things in due manner, that shall belong unto your said Command and the Trust We have reposed in you, according to the several Powers and Directions granted or appointed you by this present Commission, and the Instructions and Authorities herewith given you, or by such further Powers,

¹ Ricord and Nelson, *Documents relating to the Colonial History of the State of New Jersey*, IX, 23-34 *passim*.

Instructions and Authorities as shall at any time hereafter be granted or appointed you under Our Signet and Sign Manual or by Our Order in Our Privy Council, and according to such reasonable Laws and Statutes, as now are in Force, or hereafter shall be made and agreed upon by you, with the Advice and Consent of Our Council and the Assembly of Our said Province under your Government, in such manner and form as is hereafter expressed. . . .

And We do hereby give and grant unto you full Power and Authority to suspend any of the Members of Our said Council, from sitting, voting and assisting therein, if you shall find just Cause for so doing.

And if it shall at any time happen, that by the Death, Departure out of Our said Province, or suspension of any of Our said Councillors or otherwise, there shall be a Vacancy in Our said Council, any three whereof We do hereby appoint to be a Quorum; Our Will and Pleasure is, that you signify the same unto us by the first opportunity, that We may under Our Signet and Sign Manual constitute and appoint others in their Stead. . . .

And We do hereby give and grant unto You full Power & Authority with the Advice and Consent of Our said Council, from time to time as need shall require, to summon and call general Assemblies of the said Freeholders and Planters within your Government, in manner and form as shall be directed in Our Instructions, which shall be given you together with this Our Commission. . . .

And you . . ., with the Consent of Our said Council, [and] Assembly or the Major Part of them respectively, shall have full Power and Authority to make, constitute and ordain Laws, Statutes and Ordinances for the publick Peace, Welfare & good Government of Our said Province and of the People and Inhabitants thereof, and such others as shall resort thereto, and for the Benefit of Us, Our Heirs and Successors; which said Laws, Statutes and Ordinances are not to be repugnant, but as near as may be agreeable unto the Laws and Statutes of this Our Kingdom of Great Britain; provided that all such Laws, Stat-

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utes and Ordinances, of what Nature or duration soever, be, within three Months or sooner after the making thereof, transmitted unto Us under Our Seal of Nova Cæsarea or New Jersey, for Our Approbation or disallowance of the same, as also Duplicates thereof by the next Conveyance.

And in case any or all of the said Laws, Statutes and Ordinances (being not before confirm'd by Us) shall at any time be disallow'd and not approved, and so signified by Us, Our Heirs or Successors under Our or their Sign Manual and Signet, or by Order of Our or their Privy Council unto you . . . or to the Commander in Chief of Our said Province for the time being, then such and so many of the said Laws, Statutes and Ordinances as shall be so disallowed and not approved, shall from henceforth cease, determine and become utterly void and of none Effect, any thing to the contrary thereof notwithstanding.

And to the end that nothing may be passed or done by Our said Council or Assembly, to the Prejudice of us, Our Heirs and Successors, *We Will & Ordain*, that you . . . shall have and enjoy a Negative Voice in the making and passing of all Laws, Statutes and Ordinances, as aforesaid.

And you shall and may likewise from time to time, as you shall judge it necessary, adjourn, prorogue and dissolve all General Assemblies, as aforesaid. . . .

And We do further by these Presents give and grant unto you . . . full Power and Authority with the Advice and Consent of Our said Council, to erect, constitute and appoint such & so many Courts of Judicature and publick justice within Our said Province under your Government, as you and they shall think fit and necessary for the hearing and determining all causes, as well Criminal as Civil, according to Law and Equity. . . .

And We do hereby authorize and impower You to constitute and appoint Judges (and in Cases requisite Commissioners of Oyer and Terminer), Justices of the Peace, and other necessary Officers and Ministers in Our said Province for the better Administration of Justice and putting the Laws in Execution, and to administer or cause to be administered unto them such

Oath or Oaths as are usually given for the due Execution and Performance of Offices and Places, and for the clearing of Truth in Judicial Causes.

And We do hereby give and grant unto you full Power and Authority where you shall see Cause, or shall judge any offender or offenders in criminal Matters, or for any Fines or Forfeitures due unto Us, fit Objects of Our Mercy, to pardon all such Offenders, and to remit all such Offences, Fines and Forfeitures, Treason and Willful Murder only excepted, in which Cases you shall likewise have Power upon extraordinary Occasions to grant Reprieves to the Offenders, untill and to the Intent Our Royal Pleasure may be Known therein.

And We do by these Presents authorize and empower you to collate any Person or Persons to any Churches, Chapels or other Ecclesiastical Benefices within Our said Province, as often as any of them shall happen to be void.

And We do hereby give and grant unto you . . . by yourself or by your Captains and Commanders by you to be authorized, full Power and Authority to levy, arm, muster, command, and imploy all Persons whatsoever residing within Our said Province of Nova Cæsarea or New Jersey under your Government, and, as Occasion shall serve, to march from one place to another, or to embark them for the resisting and withstanding of all Enemies, Pirates and Rebels, both at Sea and Land, and to transport such Forces to any of Our Plantations in America (if necessity shall require) for the Defence of the same against the invasion or Attempts of any of Our Enemies, and such Enemies, Pirates and Rebels, if there shall be occasion, to persue and prosecute in or out of the Limits of Our said Province and Plantations or any of them; and, if it shall so please God, them to vanquish, apprehend and take, and being taken either according to Law to put to Death, or Keep and preserve alive at your Discretion, & to execute Martial Law in time of Invasion or other times when by Law it may be executed, and to do and execute all and every other thing and things which to Our Captain General and Governor in Chief doth or ought of Right to belong. . . .

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Our further Will & Pleasure is, that all publick Money raised or which shall be raised by any Act hereafter to be made within Our said Province, be issued out by Warrant from You, by and with the advice & Consent of Our Council, and disposed of by you for the Support of the Government, and not otherwise. . . .

7. *Instructions to Governor Bernard of New Jersey — 1758.*¹

INSTRUCTIONS to Our Trusty and Well beloved FRANCIS BERNARD ESQ^r Our Captain General and Governor in Chief in and over Our province of Nova Cæsarea or New Jersey in America.

1st *With* these Our Instructions your [you] will receive Our Commission under Our Great Seal of Great-Britain, constituting You Our Captⁿ General and Governor in Chief in and over Our province of New Jersey, You are therefore with all convenient Speed to repair to Our said Province, and being there arrived, You are to take upon you the Execution of the Peace [Place] and Trust We have reposed in You, and forthwith to call together the Members of our Council in and for that province, viz^t. . . .

4. *You* are forthwith to communicate to Our said Council such and so many of these Our Instructions wherein their Advice and Consent are required, as likewise all such others from time to time as you shall find convenient for Our Service to be imparted to them.

5. *You* are to permit the Members of Our said Counc[il] to have and enjoy Freedom of Debate and Vote in all affairs of publick Concern, that may be debated in Council. . . .

9. *And* in the Choice and nomination of the Members of Our said Council, as also of the Chief Officers, Judges, Assistant Justices and Sheriffs; You are always to take Care, that they be men of good life, well affected to our Government, of good Estates, and of Abilities suitable to their Employments. . . .

12. *And Our Will and Pleasure is*, that with all convenient

¹ Ricord and Nelson, *Documents relating to the Colonial History of the State of New Jersey*, IX, 40-77 *passim*.

Speed you call together one general Assembly for the enacting of Laws for the joint and mutual Good of the whole province. . . .

14. *You* are to choose in the passing of Laws, that the Stile of enacting the same be by the Governor, Council and Assembly and no other; You are also, as much as possible, to observe in the passing of all Laws, that whatever may be requisite upon each different matter be accordingly provided for by a different Law, without Intermixing in one and the same Act such things as have no proper relation to each other, and you are more especially to take care, that no Clause or Clauses be inserted in or annexed to any Act, which shall be foreign to what the Title of such respective Act imports; and that no perpetual Clause be made part of any temporary Law; and that no Act whatsoever be suspended, altered, continued, revived or repeated [repealed] by general Words, but that the Title and Date of such Act so suspended, alter'd, continued, revived or repealed be particularly mentioned and expressed in the enacting part.

15. *And* whereas several Laws have formerly been enacted in several of Our Plantations in America, for so short a time, that the Assent or refusal of Our Royal predecessors cou'd not be had thereupon before the time, for which such Laws were enacted, did expire; You shall not for the future give Your Assent to any Law; that shall be enacted for a less time than two Years, except in the Cases hereinafter mention'd. And you shall not re-enact any Law to which the Assent of Us or Our Royal predecessors has once been refused, without express Leave for that purpose first obtained from us, upon a full Representation by you to be made to Our Commissioners for Trade and Plantations, in order to be laid before Us, of the reason and necessity for passing such Law, nor give your Assent to any Law for repeating any other act pass'd in your Government, whether the same is [has] or has not received Our Royal Approbation, unless You take care that there be a Clause inserted therein suspending and deferring the Execution thereof until Our Pleasure be known concerning the same.

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16. *And* whereas great Mischiefs do arise by the Frequent passing Bills of an unusual and extraordinary Nature and Importance in Our Plantations, which Bills remain in force there from the time of enacting until Our Pleasure be signified to the contrary; We do hereby Will and require you not to pass or give your Consent hereafter to any Bill or Bills in the Assembly of Our said Province of unusual and extraordinary Nature and importance, wherein Our Prerogative, or the Property of Our Subjects may be prejudiced, or the Trade or Shipping of this Kingdom any Ways affected, until you shall have first transmitted to Our Commissioners for Trade and Plantations, in order to be laid before Us, the Draught of such a Bill or Bills, and shall have receiv'd Our Royal Pleasure thereupon, unless you take care in the passing of any Bill of such Nature as before mentioned, that there be a Clause inserted therein, suspending and deferring the Execution thereof untill Our Pleasure shall be known concerning the same. . . .

21st *It is Our express Will and Pleasure*, that no Law for raising any imposition on Wines or other strong Liquors be made to continue for less than one whole Year, and that all other Laws made for the supply and Support of the Government shall be indefinite and without Limitation, except the same be for a temporary Service, and which shall expire and have their full effect within the time therein prefixt. . . .

23. *Whereas* several Inconveniences have arisen to Our Governments in the Plantations by Gifts and Presents made to Our Governors by the general Assemblies; you are therefore to propose unto the Assembly at their first meeting after your Arrival, and to use your utmost Endeavour with them, that an Act be passed for raising and settling a publick Revenue for defraying the necessary Charge of the Government of Our said Province, and that therein Provision be particularly made for a competent Salary to yourself. . . .

28. *You* are to transit Authentick Copies of all Laws, Statutes and Ordinances that are now made and in Force which have not yet been sent, or which at any time hereafter shall be made or enacted within the said province. . . .

29 *And* you are upon all Occasions to send unto Our Commissioners for Trade and plantations only, a particular Account of all your proceedings and of the Condition of Affairs within your Government. . . .

CHAPTER IV

ROYAL GOVERNOR AND REPRESENTATIVE ASSEMBLY

THE provincial governor, as Franklin said, had two masters: by virtue of his commission he was the agent of the Crown and the guardian of imperial interests; yet he was also the executive head of the provincial government and dependent upon local support. In all but four of the colonies the governor depended for his salary on grants of the assembly. In Georgia alone he was paid by the Crown. In Virginia and Maryland he was supported by permanent grants; in North Carolina, his salary was derived from quit-rents. The century-long struggle between Crown and Parliament was repeated in many ways in the colonies in the half-century before the Revolution. Pitching upon the old maxim that a redress of grievances must precede a grant of supplies, the colonial assemblies extorted legislation repeatedly by withholding the governor's salary. The encroachments of the assemblies upon the executive and the evils incident to these colonial practices are vividly set forth by Thomas Pownall, at one time governor of Massachusetts and later of South Carolina.

8. *The Points at Issue between the Colonies and the Crown.*¹

The King's commission to his governor, which grants the power of government, and directs the calling of a legislature, and the establishing courts, at the same time that it fixes the governor's power, according to the several powers and directions granted and appointed by the commission and instructions, adds, "and by such *further powers, instructions, and authorities*, as shall, at any time hereafter, be granted or appointed you, under our signet or sign manual, or by our order in our privy council." It should here seem, that the same power which framed the commission, with this clause in it, could also issue its *future orders and instructions* in consequence thereof: but the people of the colonies say, that the inhabitants of the colonies are entitled to all the privileges of Englishmen; that they have a right to participate in the legislative power; and that no commands of the crown, by orders in council, instructions, or letters from Secretaries of State, are

¹ Pownall, *Administration of the Colonies* (1765), 39-47 *passim*.

binding upon them, further than they please to acquiesce under such, and conform *their own actions* thereto; that they hold this right of legislature, not derived from the grace and will of the crown, and depending on the commission which continues at the will of the crown; that this right is inherent and essential to the community, as a community of Englishmen: and that therefore they must have all the rights, privileges, and full and free exercise of their own will and liberty in making laws, which are necessary to that act of legislation, — uncontrouled by any power of the crown, or of the governor, preventing or suspending that act; and, that the clause in the commission, directing the governor to call together a legislature by his writs, is declarative and not creative; and therefore he is directed to act conformably to a right actually already existing in the people, &c. . . .

Every subject, born within the^e realm, under the freedom of the Government of Great Britain, or by adoption admitted to the same, has an essential indefeasible right to be governed, under such a mode of government as has the unrestrained exercise of all those powers which form the freedom and rights of the constitution; and therefore, “the crown cannot establish any colony upon — or contract it within a *narrower scale* than the subject is entitled to, by the great charter of England.” The government of each colony must have the same powers, and the same extent of powers that the government of Great Britain has, — and must have, while it does not act contrary to the laws of Great Britain, the same freedom and independence of legislature, as the parliament of Great Britain has. This right (say they) is founded, not only in the general principles of the rights of a British subject, but is actually declared, confirmed, or granted to them in the commissions and charters which gave the particular frame of their respective constitutions. If therefore, in the first original establishment, like the original contract, they could not be established upon any scale short of the full and compleat scale of the powers of the British government, — nor the legislature be established on any thing less than the whole legislative power; much less can this power

of government and legislature, thus established, be governed, directed, restrained or restricted, by any posterior instructions or commands by the letters of Secretaries of State. But upon the supposition, that a kind of general indetermined power in the crown, to superadd instructions to the commissions and charter be admitted, where the Colonists do not make a question of the case wherein it is exerted, yet there are particular cases wherein both directive and restrictive instructions are given, and avowedly not admitted by the Colonists. It is a standing instruction, as a security of the dependence of the government of the colonies on the mother country, that no acts wherein the King's Rights, or the rights of the mother country or of private persons can be affected, shall be enacted into a law without a clause suspending the effect thereof, till his Majesty's pleasure shall be known. This suspending clause is universally rejected on the principles above, because such suspension disfranchises the inherent full power of legislature, which they claim by their rights to the British liberties, and by the special declarations of such in their charters. It does not remove this difficulty by saying, that the crown has already in its hands the power of fixing this point, by the effect of its negative given to its governor. It is said, that if the crown should withdraw that instruction, which allows certain bills to be passed into laws with a suspending clause, which instruction is not meant as a restriction upon, but an indulgence to the legislatures; that if the crown should withdraw this instruction, and peremptorily restrain its governor from enacting laws, under such circumstances as the wisdom of government cannot admit of, that then these points are actually fixed by the true constitutional power; but wherever it is so said, I must repeat my idea, that this does not remove the difficulty. For waving the doubt which the Colonists might raise, especially in the charter colonies, how far the governor ought, or ought not, to be restricted from giving his assent in cases contrary only to instructions, and not to the laws of Great Britain; waving this point, let administration consider the effects of this measure. In cases where the bills, offered by the two

branches, are for providing laws, absolutely necessary to the continuance, support, and exercise of government, and where yet the orders of the crown, and the sense of the people, are so widely different as to the mode, that no agreement can ever be come to in these points. — Is the government and administration of the government of the colonies to be suspended? The interest, perhaps the being of the plantations, to be hazarded by this obstinate variance, and can the exercise of the crown's negative, in such emergencies, and with such effect, ever be taken up as a measure of administration? And when every thing is thrown into confusion, and abandoned even to ruin by such measure, will administration justify itself by saying, that it is the fault of the Colonists? On the contrary, this very state of the case shows the necessity of some other remedy. . . .

In the course of examining these matters, will arise to consideration the following very material point. As a principal tie of the subordination of the legislatures of the colonies on the government of the mother country, they are bound by their constitutions and charters, to send all *their acts* of legislature to England, to be confirmed or abrogated by the crown; but if any of the legislatures should be found to do almost every act of legislature, by votes or orders, even to the repealing the effects of acts, suspending establishments of pay, paying services, doing chancery and other judicatory business: if matters of this sort, done by these votes and orders, never reduced into the form of an act, have their effect without ever being sent home as acts of legislature, or submitted to the allowance or disallowance of the crown: If it should be found that many, or any of the legislatures of the colonies carry the powers of legislature into execution, independent of the crown by this device, — it will be a point to be determined how far, in such cases, the subordination of the legislatures of the colonies to the government of the mother country is maintained or suspended; — or if, from emergencies arising in these governments, this device is to be admitted, the point, how far such is to be admitted, ought to be determined; and the validity of

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these votes and orders, these *Senatus Consulta* so far declared. For a point of such great importance in the subordination of the colony legislatures, and of so questionable a cast in the valid exercise of this legislative power, ought no longer to remain in question. . . .

9. "*Every Proprietary Governor has Two Masters.*"¹

It is by this Time apparent enough, that tho' the *proprietary* and popular interests spring from one and the same Source, they divide as they descend: That every proprietary Governor, for this Reason, has two Masters; one who gives him his Commission, and one who gives him his Pay: That he is on his good Behaviour to both: That if he does not fulfil with Rigour every proprietary Command, however injurious to the Province or offensive to the Assembly, he is recall'd: That if he does not gratify the Assembly in what they think they have a right to claim, he is certain to live in perpetual Broils, tho' uncertain whether he shall be enabled to live at all. And that, upon the whole, to be a Governor upon such Terms, is to be the most wretched Thing alive.

Sir *William Keith* could not be ignorant of this: And therefore, however he was instructed here at Home, either by his Principal or the Lords of Trade, resolv'd to govern himself when he came upon the Spot, by the governing Interest there. — So that his Administration was wholly different from that of his two Predecessors.

With as particular an Eye to his own particular Emolument he did indeed make his first Address to the Assembly. — But then all he said was in popular Language. — He did not so much as name the *Proprietary*: And his Hints were such as could not be misunderstood, that in case they would pay him well, he would serve them well.

The Assembly, on the other Hand, had Sense enough to discern, that this was all which could be required of a Man who had a Family to maintain with some Degree of Splendor, and

¹ Benj. Franklin, *An Historical Review of the Constitution and Government of Pennsylvania*, (1759) 72-73.

who was no richer than Plantation Governors usually are: In short, they believed in him, were liberal to him, and the Returns he annually made them were suitable to the Confidence they plac'd in him. — So that the proper Operation of one Master-Spring kept the whole Machine of Government, for a considerable Period of Time, in a more consistent Motion than it had ever known before.

Of all political Cements reciprocal Interest is the strongest: And the Subjects Money is never so well disposed of, as in the Maintenance of Order and Tranquility, and the Purchase of good Laws; for which Felicities *Keith's* Administration was deservedly memorable. . . .

10. *The Power of the Purse.*¹

The crown does, by its instructions to its governors, order them to require of the legislature a permanent support. This order of the crown is generally, if not universally rejected, by the legislatures of the colonies. The assemblies quote the precedents of the British constitution, and found all the rights and privileges which they claim on the principles thereof. They allow the truth and fitness of this principle in the British constitution, where the executive power of the crown is immediately administred by the King's Majesty; yet say, under the circumstances in which they find themselves, that there is no other measure left to them to prevent the misapplications of public money, than by an annual voting and appropriation of the salaries of the governor and other civil officers, issuing from monies lodged in the hands of a provincial treasurer appointed by the assemblies: For in these subordinate governments, remote from his Majesty's immediate influence, administred oftentimes by necessitous and rapacious governors who have no natural, altho' they have a political connection with the country, experience has shewn that such governors have misapplied the monies raised for the support of government, so that the civil officers have been left unpaid, even after having been provided for by the assembly. The point then of this very

¹ Pownall, *Administration of the Colonies* (1765), 50-53.

important question comes to this issue, whether the inconveniencies arising, and experienced by some instances of misapplications of appropriations (for which however there are in the King's courts of law, due and sufficient remedies against the offender) are a sufficient reason and ground for establishing a measure so directly contrary to the British constitution: and whether the inconveniencies to be traced in the history of the colonies, through the votes and journals of their legislatures, in which the support of governors, judges, and officers of the crown will be found to have been withheld or reduced on occasions, where the assemblies have supposed that they have had reason to disapprove the nomination, — or the person, or his conduct; — whether, I say, these inconveniencies have not been detrimental, and injurious to government; and whether, instead of these colonies being dependent on, and governed under, the officers of the crown, the scepter is not reversed, and the officers of the crown dependent on and governed by the assemblies, as the Colonists themselves allow, that this measure “renders the governor, and all the other servants of the crown, dependent on the assembly.” This is mere matter of experience; and the fact, when duly enquired into, must speak for itself: — but the operation of this measure does not end here; it extends to the assuming by the assemblies the actual executive part of the government in the case of the revenue, than which nothing is more clearly and unquestionably settled in the crown. In the colonies the treasurer is solely and entirely a servant of the assembly or general court; and although the monies granted and appropriated be, or ought to be, granted to the crown on such appropriation, the treasurer is neither named by the crown, nor its governor, nor gives security to the crown or to the Lord High Treasurer, (which seems the most proper) nor in many of the colonies, is to obey the governor's warrant in the issue, nor accounts in the auditor's office, nor in any one colony is it admitted, that he is liable to such account. In consequence of this supposed necessity, for the assembly's taking upon them the administration of the treasury and revenue, the governor and servants of the crown, in the ordin-

ary revenue of government, are not only held dependent on the assembly, but all services, where special appropriations are made for the extraordinaries which such services require, are actually executed and done by commissioners appointed by the assembly, to whose disposition such appropriations are made liable. It would be perhaps invidious, and might tend to prejudging on points which ought very seriously and dispassionately to be examined, if I were here to point out in the several instances of the actual execution of this assumed power, how almost every executive power of the crown lodged in its governor, is, where money is necessary, thus exercised by the assembly and its commissioners. . . .

CHAPTER V

THE UNION OF THE AMERICAN COLONIES

THE coercive acts of 1774 furnished the occasion for the First Continental Congress. The suggestion of an annual congress came from the Burgesses of Virginia. The House of Representatives of Massachusetts gave definiteness to the project by naming a time and place of meeting. The two notable acts of the First Congress are the Declaration of Rights and Grievances and the Association. The latter is the more important document inasmuch as it points to the assumption of revolutionary authority by the Congress. The rapid march of events forced the Second Continental Congress to assume powers far in excess of the instructions given to the delegates. The resolutions adopted in June, 1775, indicate that the Congress was already acting as a *de facto* government.

II. *Credentials of the Delegates from Massachusetts to the First Continental Congress.*¹

In the House of Representatives,
June 17th, 1774.

This house having duly considered, and being deeply affected with the unhappy differences which have long subsisted and are encreasing between Great Britain and the American Colonies, do resolve, that a meeting of Committees from the several Colonies on this Continent is highly expedient and necessary, to consult upon the present state of the Colonies, and the miseries to which they are and must be reduced by the operation of certain acts of Parliament respecting America, and to deliberate and determine upon wise and proper measures, to be by them recommended to all the Colonies, for the recovery and establishment of their just rights & liberties, civil & religious, and the restoration of union & harmony between Great Britain and the Colonies, most ardently desired by all good men. Therefore, Resolved, That the Hon.^{ble} James Bowdoin, esq^r., the Hon.^{ble} Thomas Cushing, esq^r., Mr. Samuel Adams, John Adams, & Robert Treat Paine, esq^r., be,

¹ *Journals of the Continental Congress* (Ford ed.), 1, 15-16.

and they are hereby appointed a Committee on the part of this province, for the purposes aforesaid, any three of whom to be a quorum, to meet such committees or delegates from the other Colonies as have been or may be appointed, either by their respective houses of Burgesses, or representatives, or by convention, or by the committees of correspondence appointed by the respective houses of Assembly, in the city of Philadelphia, or any other place that shall be judged most suitable by the Committee, on the first day of September next; & that the Speaker of the House be directed, in a letter to the speakers of the house of Burgesses or representatives in the several Colonies, to inform them of the substance of these Resolves.

Attested:

SAMUEL ADAMS, *Clerk.*

12. *The Association.*¹

We, his majesty's most loyal subjects, the delegates of the several colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island, Connecticut, New-York, New-Jersey, Pennsylvania, the three lower counties of Newcastle, Kent and Sussex on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, deputed to represent them in a continental Congress, held in the city of Philadelphia, on the fifth day of September, 1774, avowing our allegiance to his majesty, our affection and regard for our fellow-subjects in Great Britain and elsewhere, affected with the deepest anxiety, and most alarming apprehensions, at those grievances and distresses, with which his Majesty's American subjects are oppressed; and having taken under our most serious deliberation, the state of the whole continent, find, that the present unhappy situation of our affairs is occasioned by a ruinous system of colony administration, adopted by the British ministry about the year 1763, evidently calculated for enslaving these colonies, and, with them, the British Empire. In prosecution of which system, various acts of parliament have been passed, for raising a revenue in

¹ October 20, 1774. *Journals of the Continental Congress* (Ford ed.), 1, 75-80.

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America, for depriving the American subjects, in many instances, of the constitutional trial by jury, exposing their lives to danger, by directing a new and illegal trial beyond the seas, for crimes alleged to have been committed in America: and in prosecution of the same system, several late, cruel and oppressive acts have been passed, respecting the town of Boston and the Massachusetts-Bay, and also an act for extending the province of Quebec, so as to border on the western frontiers of these colonies, establishing an arbitrary government therein, and discouraging the settlement of British subjects in that wide extended country; thus, by the influence of civil principles and ancient prejudices, to dispose the inhabitants to act with hostility against the free Protestant colonies, whenever a wicked ministry shall chuse so to direct them.

To obtain redress of these grievances, which threaten destruction to the lives, liberty, and property of his majesty's subjects, in North-America, we are of opinion, that a non-importation, non-consumption, and non-exportation agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceable measure: and, therefore, we do, for ourselves, and the inhabitants of the several colonies, whom we represent, firmly agree and associate, under the sacred ties of virtue, honour and love of our country, as follows:

1. That from and after the first day of December next, we will not import, into British America, from Great-Britain or Ireland, any goods, wares, or merchandize whatsoever, or from any other place, any such goods, wares, or merchandize, as shall have been exported from Great-Britain or Ireland; nor will we, after that day, import any East-India tea from any part of the world; nor any molasses, syrups, paneles, coffee, or pimento, from the British plantations or from Dominica; nor wines from Madeira, or the Western Islands; nor foreign indigo.

2. We will neither import nor purchase, any slave imported after the first day of December next; after which time, we will wholly discontinue the slave trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell

our commodities or manufactures to those who are concerned in it.

3. As a non-consumption agreement, strictly adhered to, will be an effectual security for the observation of the non-importation, we, as above, solemnly agree and associate, that from this day, we will not purchase or use any tea, imported on account of the East-India company, or any on which a duty hath been or shall be paid; and from and after the first day of March next, we will not purchase or use any East-India tea whatever; nor will we, nor shall any person for or under us, purchase or use any of those goods, wares, or merchandize, we have agreed not to import, which we shall know, or have cause to suspect, were imported after the first day of December, except such as come under the rules and directions of the tenth article hereafter mentioned.

4. The earnest desire we have not to injure our fellow-subjects in Great-Britain, Ireland, or the West-Indies, induces us to suspend a non-exportation, until the tenth day of September, 1775; at which time, if the said acts and parts of acts of the British parliament herein after mentioned, are not repealed, we will not directly or indirectly, export any merchandize or commodity whatsoever to Great-Britain, Ireland, or the West-Indies, except rice to Europe.

5. Such as are merchants, and use the British and Irish trade, will give orders, as soon as possible, to their factors, agents and correspondents, in Great-Britain and Ireland, not to ship any goods to them, on any pretence whatsoever, as they cannot be received in America; and if any merchant, residing in Great-Britain or Ireland, shall directly or indirectly ship any goods, wares or merchandize, for America, in order to break the said non-importation agreement, or in any manner contravene the same, on such unworthy conduct being well attested, it ought to be made public; and, on the same being so done, we will not, from henceforth, have any commercial connexion with such merchant.

6. That such as are owners of vessels will give positive orders to their captains, or masters, not to receive on board their

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vessels any goods prohibited by the said non-importation agreement, on pain of immediate dismissal from their service.

7. We will use our utmost endeavours to improve the breed of sheep, and increase their number to the greatest extent; and to that end, we will kill them as seldom as may be, especially those of the most profitable kind; nor will we export any to the West-Indies or elsewhere; and those of us, who are or may become overstocked with, or can conveniently spare any sheep, will dispose of them to our neighbours, especially to the poorer sort, on moderate terms.

8. We will, in our several stations, encourage frugality, economy, and industry, and promote agriculture, arts and the manufactures of this country, especially that of wool; and will discountenance and discourage every species of extravagance and dissipation, especially all horse-racing, and all kinds of gaming, cock-fighting, exhibitions of shews, plays, and other expensive diversions and entertainments; and on the death of any relation or friend, none of us, or any of our families, will go into any further mourning-dress, than a black crape or ribbon on the arm or hat, for gentlemen, and a black ribbon and necklace for ladies, and we will discontinue the giving of gloves and scarves at funerals.

9. Such as are venders of goods or merchandize will not take advantage of the scarcity of goods, that may be occasioned by this association, but will sell the same at the rates we have been respectively accustomed to do, for twelve months last past. — And if any vender of goods or merchandize shall sell such goods on higher terms, or shall, in any manner, or by any device whatsoever, violate or depart from this agreement, no person ought, nor will any of us deal with any such person, or his or her factor or agent, at any time thereafter, for any commodity whatever.

10. In case any merchant, trader, or other person, shall import any goods or merchandize, after the first day of December, and before the first day of February next, the same ought forthwith, at the election of the owner, to be either re-shipped or delivered up to the committee of the county or town,

wherein they shall be imported, to be stored at the risque of the importer, until the non-importation agreement shall cease, or be sold under the direction of the committee aforesaid; and in the last-mentioned case, the owner or owners of such goods shall be reimbursed out of the sales, the first cost and charges, the profit, if any, to be applied towards relieving and employing such poor inhabitants of the town of Boston, as are immediate sufferers by the Boston port-bill; and a particular account of all goods so returned, stored, or sold, to be inserted in the public papers; and if any goods or merchandizes shall be imported after the said first day of February, the same ought forthwith to be sent back again, without breaking any of the packages thereof.

11. That a committee be chosen in every county, city, and town, by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association; and when it shall be made to appear, to the satisfaction of a majority of any such committee, that any person within the limits of their appointment has violated this association, that such majority do forthwith cause the truth of the case to be published in the gazette; to the end, that all such foes to the rights of British-America may be publicly known, and universally contemned as the enemies of American liberty; and thenceforth we respectively will break off all dealings with him or her.

12. That the committee of correspondence, in the respective colonies, do frequently inspect the entries of their custom-houses, and inform each other, from time to time, of the true state thereof, and of every other material circumstance that may occur relative to this association.

13. That all manufactures of this country be sold at reasonable prices, so that no undue advantage be taken of a future scarcity of goods.

14. And we do further agree and resolve, that we will have no trade, commerce, dealings or intercourse whatsoever, with any colony or province, in North-America, which shall not accede to, or which shall hereafter violate this association, but

will hold them as unworthy of the rights of freemen, and as inimical to the liberties of their country.

And we do solemnly bind ourselves and our constituents, under the ties aforesaid, to adhere to this association, until such parts of the several acts of parliament, passed since the close of the last war, as impose or continue duties on tea, wine, molasses, syrups, paneles, coffee, sugar, pimento, indigo, foreign paper, glass, and painters' colours, imported into America; and extend the powers of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, authorize the judge's certificate to indemnify the prosecutor from damages, that he might otherwise be liable to, from a trial by his peers, require oppressive security from a claimant of ships or goods seized, before he shall be allowed to defend his property, are repealed. — And until that part of the act of the 12. G. 3. ch. 24. entitled, "An act for the better securing his majesty's dock-yards, magazines, ships, ammunition, and stores," by which any persons charged with committing any of the offences therein described, in America, may be tried in any shire or county within the realm, is repealed — and until the four acts, passed the last session of parliament, viz. that for stopping the port and blocking up the harbour of Boston — that for altering the charter and government of the Massachusetts-Bay — and that which is entitled, "An act for the better administration of justice, &c." — and that "For extending the limits of Quebec, &c." are repealed. And we recommend it to the provincial conventions, and to the committees in the respective colonies, to establish such farther regulations as they may think proper, for carrying into execution this association. . . .

13. *Resolutions of the Second Continental Congress.*¹

June 3, 1775.

Upon motion *Resolved*, That a committee be appointed for the purpose of borrowing the sum of six thousand pounds for

¹ *Journals of the Continental Congress* (Ford ed.) II, 79, 83-84, 89, 91.

the use of America; for the repayment of which with interest, the Congress will make full and ample provision, and that the s^d com[mittee] apply the s^d sum of money to the purchase of gunpowder for the use of the Continental Army.

June 9, 1775.

The report of the committee, on the Letter from the convention of Massachusetts bay, being again read, Congress came to the following resolution:

Resolved, That no obedience being due to the Act of parliament for altering the charter of the Colony of Massachusetts bay, nor to a Governor, or a lieutenant-Governor, who will not observe the directions of, but endeavour to subvert that charter, the gov^t. and lieutenant-gov^t of that Colony are to be considered as absent, and these offices vacant; and as there is no council there, and the inconveniences, arising from the suspension of the powers of Government, are intollerable, especially at a time when Gen^l Gage hath actually levied war, and is carrying on hostilities, against his Majesty's peaceable and loyal subjects of that Colony; that, in order to conform, as near as may be, to the spirit and substance of the charter, it be recommended to the provincial Convention, to write letters to the inhabitants of the several places, which are intituled to representation in Assembly, requesting them to chuse such representatives, and that the Assembly, when chosen, do elect counsellors; which assembly and council should exercise the powers of Government, until a Governor, of his Majesty's appointment, will consent to govern the colony according to its charter.

June 14, 1775.

Resolved, That six companies of expert rifflemen, be immediately raised in Pennsylvania, two in Maryland, and two in Virginia; that each company consist of a captain, three lieutenants, four serjeants, four corporals, a drummer or trumpeter, and sixty-eight privates.

That each company, as soon as compleated, shall march and

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join the army near Boston, to be there employed as light infantry, under the command of the chief Officer in that army.

June 15, 1775.

Resolved, That a General be appointed to command all the continental forces, raised, or to be raised, for the defence of American liberty.

That five hundred dollars, per month, be allowed for his pay and expences.

The Congress then proceeded to the choice of a general, ||by ballot, ||when George Washington, Esq. was unanimously elected.

CHAPTER VI

POLITICAL DOCTRINES OF THE REVOLUTIONARY ERA

THE American revolutionists borrowed their political philosophy largely from John Locke, who in turn was the exponent of the doctrines of the English Revolution of 1688. The indebtedness of the author of the Declaration of Independence to the *Treatises on Government* is apparent to everyone who has compared that document with Locke's chapter on "the Dissolution of Governments." The bill of rights prefixed to the Massachusetts Constitution of 1780 is perhaps the most complete statement of the fundamental civil and political rights to which men of the revolutionary era laid claim.

14. *John Locke on the Dissolution of Governments.*¹

The reason why men enter into society is the preservation of their property; and the end while they choose and authorize a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the society, to limit the power, and moderate the dominion of every part and member of the society. For since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which everyone designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people;

¹ John Locke, *Two Treatises of Government* (Morley's Universal Library), §§ 222, 225.

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by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society. What I have said here concerning the legislative in general holds true also concerning the supreme executor, who having a double trust put in him, both to have a part in the legislative and the supreme execution of the law, acts against both, when he goes about to set up his own arbitrary will as the law of the society. . . .

Such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty will be borne by the people without mutiny or murmur. But if a long train of abuses, prevarications, and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going, it is not to be wondered that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected, and without which, ancient names and specious forms are so far from being better, that they are much worse than the state of Nature or pure anarchy; the inconveniences being all as great and as near, but the remedy farther off and more difficult.

15. *The Revolution in New Hampshire.*¹

In Congress at Exeter,
January 5, 1776.

Voted, That this Congress take up Civil Government for this colony in manner and form following, viz.

We, the members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony, and authorized and empowered by them to meet together, and

¹ Thorpe, *Federal and State Constitutions*, IV, 2451-53.

use such means and pursue such measures as we should judge best for the public good; and in particular to establish some form of government, provided that measure should be recommended by the Continental Congress: And a recommendation to that purpose having been transmitted to us from the said Congress: Have taken into our serious consideration the unhappy circumstances, into which this colony is involved by means of many grievous and oppressive acts of the British Parliament, depriving us of our natural and constitutional rights and privileges; to enforce obedience to which acts a powerful fleet and army have been sent to this country by the ministry of Great Britain, who have exercised a wanton and cruel abuse of their power, in destroying the lives and properties of the colonists in many places with fire and sword, taking the ships and lading from many of the honest and industrious inhabitants of this colony employed in commerce, agreeable to the laws and customs a long time used here.

The sudden and abrupt departure of his Excellency John Wentworth, Esq., our late Governor, and several of the Council, leaving us destitute of legislation, and no executive courts being open to punish criminal offenders; whereby the lives and properties of the honest people of this colony are liable to the machinations and evil designs of wicked men, *Therefore*, for the preservation of peace and good order, and for the security of the lives and properties of the inhabitants of this colony, we conceive ourselves reduced to the necessity of establishing A Form of Government to continue during the present unhappy and unnatural contest with Great Britain; Protesting and Declaring that we neaver sought to throw off our dependence upon Great Britain, but felt ourselves happy under her protection, while we could enjoy our constitutional rights and privileges. And that we shall rejoice if such a reconciliation between us and our parent State can be effected as shall be approved by the Continental Congress, in whose prudence and wisdom we confide.

Accordingly pursuant to the trust reposed in us, We do Resolve, that this Congress assume the name, power and

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authority of a house of Representatives or Assembly for the *Colony of New-Hampshire*. . . .

16. *The Declaration of Independence.*¹

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the estab-

¹ *Revised Statutes of the United States* (1878), 3-5.

lishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

17. *Massachusetts Declaration of Rights* — 1780.¹

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life: and whenever these great objects are not obtained the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish, the following *Declaration of Rights, and Frame of Government*, as the Constitution of the Commonwealth of Massachusetts.

Article I. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

II. It is the right as well as the duty of all men in society,

¹ Thorpe, *Federal and State Constitutions*, III, 1888-93.

publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

III. As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of God, and of public instructions in piety, religion, and morality: Therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily.

And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance.

And all moneys paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he

require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.

IV. The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America, in Congress assembled.

V. All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

VI. No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, law-giver, or judge, is absurd and unnatural.

VII. Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestible unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.

VIII. In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.

IX. All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth, are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

XI. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially, and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully

heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

XIII. In criminal prosecutions, the verification of facts, in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.

XIV. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

XV. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

XVI. The liberty of the press is essential to the security of freedom in a state it ought not, therefore, to be restricted in this commonwealth.

XVII. The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without

the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

XVIII. A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth.

XIX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

XX. The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.

XXI. The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

XXII. The legislature ought frequently to assemble for the redress of grievances, for correcting, strengthening, and confirming the laws, and for making new laws, as the common good may require.

XXIII. No subsidy, charge, tax, impost, or duties ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature.

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XXIV. Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

XXV. No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.

XXVI. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

XXVII. In time of peace, no soldier ought to be quartered in any house without the consent of the owner; and in time of war, such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature.

XXVIII. No person can in any case be subject to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature.

XXIX. It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

PART TWO. THE FORMATION OF STATE AND FEDERAL CONSTITUTIONS

CHAPTER VII

PRINCIPLES OF REPRESENTATIVE GOVERNMENT

THE constructive statesmen of the revolutionary era were not believers in pure democracy. In every colony there had been a governing class more or less clearly recognized. And even after the Revolution had brought new and radical leaders to the fore, the common assumption was that the masses would still be governed by the upper classes. Although the following selections from the *Federalist* refer to the new Federal Constitution, they contain a fair statement of the fundamental principles upon which all constitutions of this great constitution-making age were drafted.

18. *Distinction between Democracies and Republics.*¹

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

¹ *Federalist* (Ford ed.), No. 10 *passim*.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. . . .

19. *The Nature of Representation.*¹

The idea of an actual representation of all classes of the people by persons of each class is altogether visionary. Unless it were expressly provided in the Constitution that each different occupation should send one or more members, the thing would never take place in practice. Mechanics and manufacturers will always be inclined, with few exceptions, to give their votes to merchants in preference to persons of their own professions or trades. Those discerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them, indeed, are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend; and they are aware that, however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by the merchant than by themselves. They are sensible that their habits in life have not been such as to give them those acquired endowments

¹ *Federalist* (Ford ed.), No. 35 and No. 36 *passim*.

without which, in a deliberative assembly, the greatest natural abilities are for the most part useless; and that the influence and weight and superior acquirements of the merchants render them more equal to a contest with any spirit which might happen to infuse itself into the public councils, unfriendly to the manufacturing and trading interests. These considerations, and many others that might be mentioned, prove, and experience confirms it, that artisans and manufacturers will commonly be disposed to bestow their votes upon merchants and those whom they recommend. We must therefore consider merchants as the natural representatives of all these classes of the community.

With regard to the learned professions little need be observed; they truly form no distinct interest in society, and, according to their situation and talents, will be indiscriminately the objects of the confidence and choice of each other, and of other parts of the community.

Nothing remains but the landed interest; and this, in a political view, and particularly in relation to taxes, I take to be perfectly united, from the wealthiest landlord down to the poorest tenant. No tax can be laid on land which will not affect the proprietor of millions of acres as well as the proprietor of a single acre. Every landholder will therefore have a common interest to keep the taxes on land as low as possible; and common interest may always be reckoned upon as the surest bond of sympathy. But if we even could suppose a distinction of interest between the opulent landholder and the middling farmer, what reason is there to conclude that the first would stand a better chance of being deputed to the national legislature than the last? If we take fact as our guide, and look into our own Senate and Assembly,¹ we shall find that moderate proprietors of land prevail in both; nor is this less the case in the Senate, which consists of a smaller number, than in the Assembly, which is composed of a greater number. Where the qualifications of the electors are the same, whether they have to choose a small or a large number, their votes will fall upon

¹ The Senate and Assembly of New York.

those in whom they have the most confidence, whether these happen to be men of large fortunes, or of moderate property, or of no property at all.

It is said to be necessary that all classes of citizens should have some of their own number in the representative body in order that their feelings and interests may be the better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free. Where this is the case, the representative body, with too few exceptions to have any influence on the spirit of the government, will be composed of landholders, merchants, and men of the learned professions. . . .

We have seen that the result of the observations to which the foregoing number has been principally devoted is that from the natural operation of the different interests and views of the various classes of the community, whether the representation of the people be more or less numerous, it will consist almost entirely of proprietors of land, of merchants, and of members of the learned professions, who will truly represent all those different interests and views. If it should be objected that we have seen other descriptions of men in the local legislatures, I answer that it is admitted there are exceptions to the rule, but not in sufficient number to influence the general complexion or character of the government. There are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all; and I trust, for the credit of human nature that we shall see examples of such vigorous plants flourishing in the soil of federal as well as of State legislation; but occasional instances of this sort will not render the reasoning founded upon the general course of things less conclusive. . . .

20. *The Doctrine of the Separation of Powers.*¹

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point. . . .

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depository of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of

¹ *Federalist* (Ford ed.), No. 47 *passim*.

one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be the *legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of an *oppressor*." Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they suffi-

ciently establish the meaning which we have put on this celebrated maxim of this celebrated author.

21. *Checks and Balances.*¹

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own, and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary considerations ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the

¹ *Federalist* (Ford ed.), No. 51.

several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

CHAPTER VIII

STATE CONSTITUTIONS OF THE REVOLUTIONARY ERA

THE outbreak of the Revolution was marked in all the proprietary and royal provinces by the elimination of the governor. Government fell into the hands of the assemblies, or of irregular congresses and conventions, acting under no other authority than that derived from public opinion. Nothing attests more strongly the law-abiding instinct of the provincial leaders than their insistent efforts to replace their revolutionary bodies by regularly constituted governments. On May 15, 1776, Congress "recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general." Before the end of the war, eleven of the colonies had framed State Constitutions and established orderly governments. Rhode Island and Connecticut continued to live under their charters, which with minor changes served as constitutions. Importance attaches to these first State Constitutions not only because they exhibit the political ideas of the time, but also because they reveal precedents and practices upon which the framers of the National Constitution drew in the Convention of 1787. While these constitutions differ in detail, they have much in common. In their provisions for the organization of the powers of government, the Constitutions of New Jersey and Virginia may be accounted typical. It should be noted, however, that in five States the governor was elected by popular vote, and that Pennsylvania and Georgia had uni-cameral legislatures.

22. *Transition from Colony to Commonwealth in Connecticut* — 1776.¹

The People of this State, being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State; and having from their Ancestors derived a free and excellent Constitution of Government whereby the Legislature depends on the free and annual Election of the People, they have the best Security for the Preservation of their civil and religious Rights and Liberties. And forasmuch as the free Fruition of such Liberties and Privileges

¹ Poore, *Charters and Constitutions*, I, 257.

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as Humanity, Civility, and Christianity call for, as is due to every Man in his Place and Proportion, without Impeachment and Infringement, hath ever been, and will be the Tranquility and Stability of Churches and Commonwealths; and the Denial thereof, the Disturbance, if not the Ruin of both.

Paragraph 1. *Be it enacted and declared by the Governor, and Council, and House of Representatives, in General Court assembled, That the ancient Form of Civil Government, contained in the Charter from Charles the Second, King of England, and adopted by the People of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the People thereof, independent of any King or Prince whatever. And that this Republic is, and shall forever be and remain, a free, sovereign and independent State, by the Name of the STATE of CONNECTICUT. . . .*

23. *Constitution of New Jersey — 1776.*¹

We, the representatives of the colony of New Jersey, having been elected by all the counties, in the freest manner, and in congress assembled, have, after mature deliberations, agreed upon a set of charter rights and the form of a Constitution, in manner following, viz.

I. That the government of this Province shall be vested in a Governor, Legislative Council, and General Assembly.

II. That the Legislative Council, and General Assembly, shall be chosen, for the first time, on the second Tuesday in August next; the members whereof shall be the same in number and qualifications as are herein after mentioned; and shall be and remain vested with all the powers and authority to be held by any future Legislative Council and Assembly of this Colony, until the second Tuesday in October, which shall be in the year of our Lord one thousand seven hundred and seventy-seven.

III. That on the second Tuesday in October yearly, and every year forever (with the privilege of adjourning from day to day as occasion may require) the counties shall severally

¹ Thorpe, *Federal and State Constitutions*, v, 2594-2598.

choose one person, to be a member of the Legislative Council of this Colony, who shall be, and have been, for one whole year next before the election, an inhabitant and freeholder in the county in which he is chosen, and worth at least one thousand pounds proclamation money, of real and personal estate, within the same county; that, at the same time, each county shall also choose three members of Assembly; provided that no person shall be entitled to a seat in the said Assembly unless he be, and have been, for one whole year next before the election, an inhabitant of the county he is to represent, and worth five hundred pounds proclamation money, in real and personal estate, in the same county: that on the second Tuesday next after the day of election, the Council and Assembly shall separately meet; and that the consent of both Houses shall be necessary to every law; provided, that seven shall be a quorum of the Council, for doing business, and that no law shall pass, unless there be a majority of all the Representatives of each body personally present, and agreeing thereto. Provided always, that if a majority of the representatives of this Province, in Council and General Assembly convened, shall, at any time or times hereafter, judge it equitable and proper, to add to or diminish the number or proportion of the members of Assembly for any county or counties in this Colony, then, and in such case, the same may, on the principles of more equal representation, be lawfully done; anything in this Charter to the contrary notwithstanding: so that the whole number of Representatives in Assembly shall not, at any time, be less than thirty-nine.

IV. That all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for Representatives in Council and Assembly; and also for all other public officers, that shall be elected by the people of the county at large.

V. That the Assembly, when met, shall have power to choose a Speaker, and other their officers; to be judges of the qualifi-

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cations and elections of their own members; sit upon their own adjournments; prepare bills, to be passed into laws; and to empower their Speaker to convene them, whenever any extraordinary occurrence shall render it necessary.

VI. That the Council shall also have power to prepare bills to pass into laws, and have other like powers as the Assembly, and in all respects be a free and independent branch of the Legislature of this Colony; save only, that they shall not prepare or alter any money bill — which shall be the privilege of the Assembly; that the Council shall, from time to time, be convened by the Governor or Vice-President, but must be convened, at all times, when the Assembly sits; for which purpose the Speaker of the House of Assembly shall always, immediately after an adjournment, give notice to the Governor, or Vice-President, of the time and place to which the House is adjourned.

VII. That the Council and Assembly jointly, at their first meeting after each annual election, shall, by a majority of votes, elect some fit person within the Colony, to be Governor for one year, who shall be constant President of the Council, and have a casting vote in their proceedings; and that the Council themselves shall choose a Vice-President who shall act as such in the absence of the Governor.

VIII. That the Governor, or, in his absence, the Vice-President of the Council, shall have the supreme executive power, be Chancellor of the Colony, and act as captain-general and commander in chief of all the militia, and other military force in this Colony; and that any three or more of the Council shall, at all times, be a privy-council, to consult them; and that the Governor be ordinary or surrogate-general.

IX. That the Governor and Council, (seven whereof shall be a quorum) be the Court of Appeals, in the last resort, in all causes of law, as heretofore; and that they possess the power of granting pardons to criminals, after condemnation, in all cases of treason, felony, or other offences.

X. That captains, and all other inferior officers of the militia, shall be chosen by the companies, in the respective

counties; but field and general officers, by the Council and Assembly.

XI. That the Council and Assembly shall have power to make the Great Seal of this Colony, which shall be kept by the Governor, or, in his absence, by the Vice-President of the Council, to be used by them as occasion may require: and it shall be called, *The Great Seal of the Colony of New-Jersey*.

XII. That the Judges of the Supreme Court shall continue in office for seven years: the Judges of the Inferior Court of Common Pleas in the several counties, Justices of the Peace, Clerks of the Supreme Court, Clerks of the Inferior Court of Common Pleas and Quarter Sessions, the Attorney-General, and Provincial Secretary, shall continue in office for five years: and the Provincial Treasurer shall continue in office for one year; and that they shall be severally appointed by the Council and Assembly, in manner aforesaid, and commissioned by the Governor, or, in his absence, the Vice-President of the Council. Provided always, that the said officers, severally, shall be capable of being re-appointed, at the end of the terms severally before limited; and that any of the said officers shall be liable to be dismissed, when adjudged guilty of misbehaviour, by the Council, on an impeachment of the Assembly. . . .

XX. That the legislative department of this government may, as much as possible, be preserved from all suspicion of corruption, none of the Judges of the Supreme or other Courts, Sheriffs, or any other person or persons possessed of any post of profit under the government, other than Justices of the Peace, shall be entitled to a seat in the Assembly: but that, on his being elected, and taking his seat, his office or post shall be considered as vacant.

XXI. That all the laws of this Province, contained in the edition lately published by Mr. Allinson, shall be and remain in full force, until altered by the Legislature of this Colony (such only excepted, as are incompatible with this Charter) and shall be, according as heretofore, regarded in all respects, by all civil officers, and others, the good people of this Province.

XXII. That the common law of England, as well as so much

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of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony without repeal, forever. . . .

Provided always, and it is the true intent and meaning of this Congress, that if a reconciliation between Great-Britain and these Colonies should take place, and the latter be taken again under the protection and government of the crown of Britain, this Charter shall be null and void — otherwise to remain firm and inviolable.

24. *Constitution of Virginia — 1776.*¹

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We therefore, the delegates and representatives of the good people of Virginia, having maturely considered the premises, and viewing with great concern the deplorable conditions to which this once happy country must be reduced, unless some regular, adequate mode of civil polity is speedily adopted, and in compliance with a recommendation of the General Congress, do ordain and declare the future form of government of Virginia to be as followeth:

The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the Justices of the County Courts shall be eligible to either House of Assembly.

The legislative shall be formed of two distinct branches, who, together, shall be a complete Legislature. They shall meet once, or oftener, every year, and shall be called, *The General Assembly of Virginia*. One of these shall be called, *The House of Delegates*, and consist of two Representatives, to be chosen for each county, and for the district of West-Augusta, annually,

¹ Thorpe, *Federal and State Constitutions*, VII, 3815-19.

of such men as actually reside in, and are freeholders of the same, or duly qualified according to law, and also of the Delegate or Representative, to be chosen annually for the city of Williamsburgh, and one for the borough of Norfolk, and a Representative for each of such other cities and boroughs, as may hereafter be allowed particular representation by the legislature; but when any city or borough shall so decrease, as that the number of persons, having right of suffrage therein, shall have been, for the space of seven years successively, less than half the number of voters in some one county in Virginia, such city or borough thenceforward shall cease to send a Delegate or Representative to the Assembly.

The other shall be called *The Senate*, and consist of twenty-four members, of whom thirteen shall constitute a House to proceed on business; for whose election, the different counties shall be divided into twenty-four districts; and each county of the respective district, at the time of the election of its Delegates, shall vote for one Senator, who is actually a resident and freeholder within the district, or duly qualified according to law, and is upwards of twenty-five years of age; and the Sheriffs of each county, within five days at farthest, after the last county election in the district, shall meet at some convenient place, and from the poll, so taken in their respective counties, return, as a Senator, the man who shall have the greatest number of votes in the whole district. To keep up this Assembly by rotation, the districts shall be equally divided into four classes and numbered by lot. At the end of one year after the general election, the six members, elected by the first division, shall be displaced, and the vacancies thereby occasioned supplied from such class or division, by new election, in the manner aforesaid. This rotation shall be applied to each division, according to its number, and continued in due order annually.

The right of suffrage in the election of members for both Houses shall remain as exercised at present; and each House shall choose its own Speaker, appoint its own officers, settle its own rules of proceeding, and direct writs of election, for the supplying intermediate vacancies.

All laws shall originate in the House of Delegates, to be approved of or rejected by the Senate, or to be amended, with consent of the House of Delegates; except money-bills, which in no instance shall be altered by the Senate, but wholly approved or rejected.

A Governor, or chief magistrate, shall be chosen annually by joint ballot of both Houses (to be taken in each House respectively) deposited in the conference room; the boxes examined jointly by a committee of each House, and the numbers severally reported to them, that the appointments may be entered (which shall be the mode of taking the joint ballot of both Houses, in all cases), who shall not continue in that office, longer than three years successively, nor be Eligible, until the expiration of four years after he shall have been out of that office. An adequate, but moderate salary shall be settled on him, during his continuance in office; and he shall, with the advice of a Council of State, exercise the executive powers of government, according to the laws of this Commonwealth; and shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England. But he shall, with the advice of the Council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates, or the law shall otherwise particularly direct; in which cases, no reprieve or pardon shall be granted, but by resolve of the House of Delegates.

Either House of the General Assembly may adjourn themselves respectively. The Governor shall not prorogue or adjourn the Assembly, during their sitting, nor dissolve them at any time; but he shall, if necessary, either by advice of the Council of State, or on application of a majority of the House of Delegates, call them before the time to which they shall stand prorogued or adjourned.

A Privy Council, or Council of State, consisting of eight members, shall be chosen, by joint ballot of both Houses of Assembly, either from their own members or the people at large, to assist in the administration of government. They

shall annually choose, out of their own members, a President, who, in case of death, inability, or absence of the Governor from the government, shall act as Lieutenant-Governor. Four members shall be sufficient to act, and their advice and proceedings shall be entered on record, and signed by the members present, (to any part whereof, any member may enter his dissent) to be laid before the General Assembly, when called for by them. This Council may appoint their own Clerk, who shall have a salary settled by law, and take an oath of secrecy, in such matters as he shall be directed by the board to conceal. A sum of money, appropriated to that purpose, shall be divided annually among the members, in proportion to their attendance; and they shall be incapable, during their continuance in office, of sitting in either House of Assembly. Two members shall be removed, by joint ballot of both Houses of Assembly, at the end of every three years, and be ineligible for the three next years. These vacancies, as well as those occasioned by death or incapacity, shall be supplied by new elections, in the same manner.

The Delegates for Virginia to the Continental Congress shall be chosen annually, or superseded in the mean time, by joint ballot of both Houses of Assembly.

The present militia officers shall be continued, and vacancies supplied by appointment of the Governor, with the advice of the Privy-Council, on recommendations from the respective County Courts; but the Governor and Council shall have a power of suspending any officer, and ordering a Court Martial, on complaint of misbehaviour or inability, or to supply vacancies of officers, happening when in actual service.

The Governor may embody the militia, with the advice of the Privy Council; and when embodied, shall alone have the direction of the militia, under the laws of the country.

The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office during good behaviour. In case of death, in-

capacity, or resignation, the Governor, with the advice of the Privy Council, shall appoint persons to succeed in office, to be approved or displaced by both Houses. These officers shall have fixed and adequate salaries, and, together with all others, holding lucrative offices, and all ministers of the gospel, of every denomination, be incapable of being elected members of either House of Assembly or the Privy Council.

The Governor, with the advice of the Privy Council, shall appoint Justices of the Peace for the counties; and in case of vacancies, or a necessity of increasing the number hereafter, such appointments to be made upon the recommendation of the respective County Courts. The present acting Secretary in Virginia, and Clerks of all the County Courts, shall continue in office. In case of vacancies, either by death, incapacity, or resignation, a Secretary shall be appointed, as before directed; and the Clerks, by the respective Courts. The present and future Clerks shall hold their offices during good behaviour, to be judged of, and determined in the General Court. The Sheriffs, and Coroners shall be nominated by the respective Courts, approved by the Governor, with the advice of the Privy Council, and commissioned by the Governor. The Justices shall appoint Constables; and all fees of the aforesaid officers be regulated by law.

The Governor, when he is out of office, and others, offending against the State, either by mal-administration, corruption, or other means, by which the safety of the State may be endangered, shall be impeachable by the House of Delegates. Such impeachment to be prosecuted by the Attorney-General, or such other person or persons, as the House may appoint in the General Court, according to the laws of the land. If found guilty, he or they shall be either forever disabled to hold any office under government, or be removed from such office *pro tempore*, or subjected to such pains or penalties as the laws shall direct.

If all or any of the Judges of the General Court should on good grounds (to be judged of by the House of Delegates) be accused of any of the crimes or offences above mentioned, such

House of Delegates, may, in like manner, impeach the Judge or Judges so accused, to be prosecuted in the Court of Appeals; and he or they, if found guilty, shall be punished in the same manner as is prescribed in the preceding clause.

Commissions and grants shall run, "*In the name of the Commonwealth of Virginia,*" and bear test by the Governor, with the seal of the Commonwealth annexed. Writs shall run in the same manner, and bear test by the Clerks of the several Courts. Indictments shall conclude, "*Against the peace and dignity of the Commonwealth.*"

A Treasurer shall be appointed annually, by joint ballot of both Houses. . . .

CHAPTER IX

THE FIRST FEDERAL CONSTITUTION

THE Articles of Confederation may be studied from two points of view. On the one hand, they may be viewed as the first and necessarily imperfect, attempt of the colonies to form a confederation. When the absence of inter-colonial unity previous to the issues brought to the front by the Stamp Act is kept in mind, this "league of friendship" appears as a notable move in the direction of perpetual union. On the other hand, American society had political wants which this confederation failed to satisfy. By the year 1781, when the last of the States ratified the Articles, the inadequacy of the new federal government was already apparent to everyone.

25. *The Articles of Confederation.*¹

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Articles of Confederation and perpetual Union between the States of Newhamshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

ARTICLE I. THE stile of this confederacy shall be "The United States of America."

ARTICLE II. EACH State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. THE said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. THE better to secure and perpetuate mutual friendship and intercourse among the people of the different

¹ *Revised Statutes of the United States* (1878), 7-11.

States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other state of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

IF any Person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. FOR the more convenient management of the general interest of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of

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the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a

well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. WHEN land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. ALL charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

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The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. THE United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

THE United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the

matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such

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settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

THE United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States — fixing the standard of weights and measures throughout the United States — regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated — establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office — appointing all officers of the land forces, in the service of the United States, excepting regimental officers — appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States — making rules for the government and regulation of the said land and naval forces, and directing their operations.

THE United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction — to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses — to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted, — to build and equip a navy — to agree upon the number of

land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

THE United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

THE Congress of the United States shall have power to

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adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

ARTICLE X. THE committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. ALL bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

ARTICLE XIII. EVERY State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any

alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it hath pleased the Great Governor of the World to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

CHAPTER X

DEFECTS OF THE CONFEDERATION

No one saw and described more clearly the real nature of government under the Articles of Confederation than Alexander Hamilton. In collaboration with Madison and Jay, he published in various journals, under the pen-name of "Publius," a series of letters addressed to the people of the State of New York in advocacy of the new Constitution. In the division of labor among these three, Hamilton undertook to examine the defects of the confederation and to expound the details of the projected government. For both tasks he was admirably fitted, for to remarkable powers of exposition he joined extraordinary keenness of observation and criticism. Numbers 15 and 21 of the *Federalist*, as these letters were commonly called, appeared in the *Independent Journal* on December 1 and 12, 1787.

26. *Dependence of the Confederation on the State Governments.*¹

. . . The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends. Except as to the rule of apportionment, the United States have an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that, though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations, which the States observe or disregard at their option.

It is a singular instance of the capriciousness of the human mind, that after all the admonitions we have had from experi-

¹ *Federalist* (Ford ed.), No. 15, 90-95.

ence on this head, there should still be found men, who object to the New Constitution, for deviating from a principle which has been found the bane of the old; and which is, in itself, evidently incompatible with the idea of GOVERNMENT; a principle, in short, which, if it is to be executed at all, must substitute the violent and sanguinary agency of the sword to the mild influence of the Magistracy.

There is nothing absurd or impracticable in the idea of a league or alliance between independent nations, for certain defined purposes precisely stated in a treaty; regulating all the details of time, place, circumstance, and quantity; leaving nothing to future discretion; and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and non-observance, as the interests or passions of the contracting powers dictate. In the early part of the present century, there was an epidemical rage in Europe for this species of compacts; from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power and the peace of that part of the world, all the resources of negotiation were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith; and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion.

If the particular States in this country are disposed to stand in a similar relation to each other, and to drop the project of a general *discretionary superintendence*, the scheme would indeed be pernicious, and would entail upon us all the mischiefs which have been enumerated under the first head; but it would have the merit of being, at least, consistent and practicable. Abandoning all views towards a Confederate Government, this would bring us to a simple alliance offensive and defensive; and would place us in a situation to be alternately friends and en-

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emies of each other, as our mutual jealousies and rivalships, nourished by the intrigues of foreign nations, should prescribe to us.

But if we are unwilling to be placed in this perilous situation; if we still will adhere to the design of a National Government, or, which is the same thing, of a superintending power, under the direction of a common council, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a Government; we must extend the authority of the Union to the persons of the citizens, — the only proper objects of Government.

Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the Courts and Ministers of Justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms. The first kind can evidently apply only to men: the last kind must, of necessity, be employed against bodies politic, or communities, or States. It is evident, that there is no process of a Court by which the observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty; but these sentences can only be carried into execution by the sword. In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of Government, nor would any prudent man choose to commit his happiness to it.

There was a time when we were told that breaches, by the States, of the regulations of the Federal authority were not to be expected; that a sense of common interest would preside

over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has Government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number, than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses, for which they would blush in a private capacity.

In addition to all this, there is, in the nature of sovereign power, an impatience of control, that disposes those who are invested with the exercise of it, to look with an evil eye upon all external attempts to restrain or direct its operations. From this spirit it happens, that in every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of eccentric tendency in the subordinate or inferior orbs, by the operation of which there will be a perpetual effort in each to fly off from the common centre. This tendency is not difficult to be accounted for. It has its origin in the love of power. Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged. This simple proposition will teach us, how little reason there is to expect, that the persons intrusted with the administration of the affairs

of the particular members of a Confederacy will at all times be ready, with perfect good-humor, and an unbiased regard to the public weal, to execute the resolutions or decrees of the general authority. The reverse of this results from the constitution of human nature.

If therefore the measures of the Confederacy cannot be executed, without the intervention of the particular administrations, there will be little prospect of their being executed at all. The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves. They will consider the conformity of the thing proposed or required to their immediate interests or aims; the momentary conveniences or inconveniences that would attend its adoption. All this will be done; and in a spirit of interested and suspicious scrutiny, without that knowledge of National circumstances and reasons of State, which is essential to a right judgment, and with that strong predilection in favor of local objects, which can hardly fail to mislead the decision. The same process must be repeated in every member of which the body is constituted; and the execution of the plans, framed by the councils of the whole, will always fluctuate on the discretion of the ill-informed and prejudiced opinion of every part. Those who have been conversant in the proceedings of popular assemblies; who have seen how difficult it often is, when there is no exterior pressure of circumstances, to bring them to harmonious resolutions on important points, will readily conceive how impossible it must be to induce a number of such assemblies, deliberating at a distance from each other, at different times, and under different impressions, long to coöperate in the same views and pursuits.

. . .

27. *Specific Defects of the Confederation.*¹

. . . The next most palpable defect of the subsisting Confederation is the total want of a *sanction* to its laws. The United States, as now composed, have no powers to exact obedience,

¹ *Federalist* (Ford ed.), No. 21, 124-129.

or punish disobedience to their resolutions, either by pecuniary mulcts, by a suspension or divesture of privileges, or by any other constitutional mode. There is no express delegation of authority to them to use force against delinquent members; and if such a right should be ascribed to the Federal head, as resulting from the nature of the social compact between the States, it must be by inference and construction, in the face of that part of the second Article, by which it is declared, "that each State shall retain every power, jurisdiction, and right, not *expressly* delegated to the United States in Congress assembled." There is, doubtless, a striking absurdity in supposing that a right of this kind does not exist, but we are reduced to the dilemma either of embracing that supposition, preposterous as it may seem, or of contravening or explaining away a provision, which has been of late a repeated theme of the eulogies of those who oppose the new Constitution; and the want of which, in that plan, has been the subject of much plausible animadversion, and severe criticism. If we are unwilling to impair the force of this applauded provision, we shall be obliged to conclude, that the United States afford the extraordinary spectacle of a Government, destitute even of the shadow of constitutional power to enforce the execution of its own laws. It will appear, from the specimens which have been cited, that the American Confederacy, in this particular, stands discriminated from every other institution of a similar kind, and exhibits a new and unexampled phenomenon in the political world.

The want of a mutual guaranty of the State Governments is another capital imperfection in the Federal plan. There is nothing of this kind declared in the Articles that compose it; and to imply a tacit guaranty from consideration of utility, would be a still more flagrant departure from the clause which has been mentioned, than to imply a tacit power of coercion, from the like considerations. The want of a guaranty, though it might in its consequences endanger the Union, does not so immediately attack its existence, as the want of a constitutional sanction to its laws.

Without a guaranty, the assistance to be derived from the Union in repelling those domestic dangers, which may sometimes threaten the existence of the State Constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people; while the National Government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law; while no succor could constitutionally be afforded by the Union to the friends and supporters of the Government. The tempestuous situation from which Massachusetts has scarcely emerged, evinces that dangers of this kind are not merely speculative. Who can determine, what might have been the issue of her late convulsions, if the malcontents had been headed by a Cæsar or by a Cromwell? Who can predict, what effect a despotism, established in Massachusetts, would have upon the liberties of New Hampshire or Rhode Island; of Connecticut or New York?

The inordinate pride of State importance has suggested to some minds an objection to the principle of a guaranty in the Federal Government, as involving an officious interference in the domestic concerns of the members. A scruple of this kind would deprive us of one of the principal advantages to be expected from Union; and can only flow from a misapprehension of the nature of the provision itself. It could be no impediment to reforms of the State Constitutions by a majority of the People, in a legal and peaceable mode. This right would remain undiminished. The guaranty could only operate against changes to be effected by violence. Towards the prevention of calamities of this kind, too many checks cannot be provided. The peace of society, and the stability of Government, depend absolutely on the efficacy of the precautions adopted on this head. Where the whole power of the Government is in the hands of the People, there is the less pretence for the use of violent remedies, in partial or occasional distempers of the State. The natural cure for an ill-administration, in a popular or representative Constitution, is a change of men. A guaranty by the National authority would be as much levelled against

the usurpations of rulers, as against the ferments and outrages of faction and sedition in the community.

The principle of regulating the contributions of the States to the common treasury by QUOTAS is another fundamental error in the Confederation. Its repugnancy to an adequate supply of the National exigencies has been already pointed out, and has sufficiently appeared from the trial which has been made of it. I speak of it now solely with a view to equality among the States. Those who have been accustomed to contemplate the circumstances which produce constitutional wealth, must be satisfied that there is no common standard or barometer, by which the degrees of it can be ascertained. Neither the value of lands, nor the numbers of the People, which have been successively proposed as the rule of State contributions, has any pretension to being a just representative. If we compare the wealth of the United Netherlands with that of Russia or Germany, or even of France; and if we at the same time compare the total value of the lands and the aggregate population of that contracted district with the total value of the lands and the aggregate population of the immense regions of either of the three last-mentioned countries, we shall at once discover, that there is no comparison between the proportion of either of these two objects, and that of the relative wealth of those nations. If the like parallel were to be run between several of the American States, it would furnish a like result. Let Virginia be contrasted with North Carolina, Pennsylvania with Connecticut, or Maryland with New Jersey, and we shall be convinced that the respective abilities of those States, in relation to revenue, bear little or no analogy to their comparative stock in lands or to their comparative population. The position may be equally illustrated by a similar process between the counties of the same State. No man who is acquainted with the State of New York will doubt that the active wealth of King's County bears a much greater proportion to that of Montgomery, than it would appear to be, if we should take either the total value of the lands, or the total numbers of the People, as a criterion!

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The wealth of nations depends upon an infinite variety of causes. Situation, soil, climate, the nature of the productions, the nature of the Government, the genius of the citizens, the degree of information they possess, the state of commerce, of arts, of industry, these circumstances, and many more, too complex, minute, or adventitious, to admit of a particular specification, occasion differences hardly conceivable in the relative opulence and riches of different countries. The consequence clearly is, that there can be no common measure of National wealth; and, of course, no general or stationary rule, by which the ability of a State to pay taxes can be determined. The attempt, therefore, to regulate the contributions of the members of a Confederacy by any such rule, cannot fail to be productive of glaring inequality and extreme oppression.

This inequality would of itself be sufficient in America to work the eventual destruction of the Union, if any mode of enforcing a compliance with its requisitions could be devised. The suffering States would not long consent to remain associated upon a principle which distributes the public burdens with so unequal a hand, and which was calculated to impoverish and oppress the citizens of some States, while those of others would scarcely be conscious of the small proportion of the weight they were required to sustain. This, however, is an evil inseparable from the principle of quotas and requisitions. . . .

CHAPTER XI

ORIGIN OF THE FEDERAL CONVENTION

THE train of events leading up to the Annapolis and Philadelphia Conventions is described by Madison in the sketch which he wrote as a preface to his notes on the debates in the Convention of 1787. So far as its immediate purposes were concerned, the Annapolis meeting was a fiasco; but the report drafted by Hamilton went far to redeem the situation. It should be noted that the movement for a betterment of federal relations had proceeded outside of Congress and without its sanction. Madison, Hamilton, and their associates were really planning a *coup d'état*. They urged a meeting of delegates from the States without referring to Congress, and then had the audacity to send a copy of their report to Congress "from motives of respect." It is also noteworthy that when Congress yielded to pressure from without and called a convention at the time and place named in the report, it never once alluded to the Annapolis Convention. The difficulties which confronted the delegates in the Philadelphia Convention are graphically described by Madison in the *Federalist*.

28. *Antecedents of the Annapolis Convention.*¹

Having served as a member of Congs. through the period between Mar. 1780 & the arrival of peace in 1783, I had become intimately acquainted with the public distresses and the causes of them. I had observed the successful — opposition to every attempt to procure a remedy by new grants of power to Congs. I had found moreover that despair of success hung over the compromising provision for the public necessities of April 1783 which had been so elaborately planned and so impressively recommended to the States. Sympathizing, under this aspect of affairs, in the alarm of the friends of free Govt, at the threatened danger of an abortive result to the great & perhaps last experiment in its favour, I could not be insensible to the obligation to co-operate as far as I could in averting the calamity. With this view I acceded to the desire of my fellow Citizens of the County that I should be one of its representa-

¹ James Madison, *Preface to Debates in the Convention of 1787*, printed in Farrand's *Records of the Federal Convention*, III, 543-45.

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tives in the Legislature, hoping that I might there best contribute to inculcate the critical posture to which the Revolutionary cause was reduced, and the merit of a leading agency of the State in bringing about a rescue of the Union and the blessings of liberty staked on it, from an impending catastrophe.

It required but little time after taking my seat in the House of Delegates in May 1784. to discover that however favorable the general disposition of the State might be towards the Confederacy the Legislature retained the aversion of its predecessors to transfers of power from the State to the Govt. of the Union; notwithstanding the urgent demands of the Federal Treasury; the glaring inadequacy of the authorized mode of supplying it, the rapid growth of anarchy in the Fedl. System, and the animosity kindled among its members by their conflicting regulations. . .

The failure however of the varied propositions in the Legislature for enlarging the powers of Congress, the continued failure of the efforts of Congs. to obtain from them the means of providing for the debts of the Revolution; and of countervailing the commercial laws of G. B, a source of much irritation & agst. which the separate efforts of the States were found worse than abortive; these Considerations with the lights thrown on the whole subject, by the free & full discussion it had undergone led to a general acquiescence in the Resoln. passed. on the 21. of Jany. 1786. which proposed & invited a meeting of Deputies from all the States to insert the Resol (See Journal.) 1.

The resolution had been brought forward some weeks before on the failure of a proposed grant of power to Congress to collect a revenue from commerce, which had been abandoned by its friends in consequence of material alterations made in the grant by a Committee of the whole. The Resolution tho introduced by Mr. Tyler an influential member, who having never served in Congress, had more the ear of the House than those whose services there exposed them to an imputable bias, was so little acceptable that it was not then persisted in. Being now

revived by him, on the last day of the Session, and being the alternative of adjourning without any effort for the crisis in the affairs of the Union, it obtained a general vote; less however with some of its friends from a confidence in the success of the experiment than from a hope that it might prove a step to a more comprehensive & adequate provision for the wants of the Confederacy.

It happened also that Commissioners who had been appointed by Virga. & Maryd. to settle the jurisdiction on waters dividing the two States had, apart from their official reports, recommended a uniformity in the regulations of the 2 States on several subjects & particularly on those having relation to foreign trade. It appeared at the same time that Maryd. had deemed a concurrence of her neighbors Pena — & Delaware indispensable in such a case, who for like reasons would require that of their neighbors. So apt and forceable an illustration of the necessity of a uniformity throughout all the States, could not but favour the passage of a Resolution which proposed a Convention having that for its object.

The commissioners appointed by the Legisl: & who attended the Convention were E. Randolph the Attorney of the State, St. Geo: Tucker & J. M. The designation of the time & place for its meeting to be proposed and communicated to the States having been left to the Comrs: they named for the time early September and for the place the City of Annapolis avoiding the residence of Congs. and large Commercial Cities as liable to suspicions of an extraneous influence.

Altho the invited Meeting appeared to be generally favored, five States only assembled; some failing to make appointments, and some of the individuals appointed not hastening their attendance, the result in both cases being ascribed mainly, to a belief that the time had not arrived for such a political reform, as might be expected from a further experience of its necessity.

But in the interval between the proposal of the Convention and the time of its meeting such had been the advance of public opinion in the desired direction, stimulated as it had been by the effect of the contemplated object of the meeting, in turning

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the general attention to the Critical State of things, and in calling forth the sentiments and exertions of the most enlightened & influential patriots, that the Convention thin as it was did not scruple to decline the limited task assigned to it, and to recommend to the States a Convention with powers adequate to the occasion; nor was it unnoticed that the commission of the N. Jersey Deputation, had extended its object to a general provision for exigencies of the Union. A recommendation for this enlarged purpose was accordingly reported by a Come. to whom the subject had been referred. It was drafted by Col: H. and finally agreed to unanimously in the following form.

29. *Report of the Annapolis Convention.*¹

To the Honorable the Legislatures of Virginia, Delaware, Pennsylvania, New Jersey, and New York, the commissioners from the said states respectively, assembled at Annapolis, humbly beg leave to report, —

That, pursuant to their several appointments, they met at Annapolis in the state of Maryland, on the 11th day of September instant; and having proceeded to a communication of their powers, they found that the states of New York, Pennsylvania, and Virginia, had, in substance, and nearly in the same terms, authorized their respective commissioners “to meet such commissioners as were or might be appointed by the other states in the Union, at such time and place as should be agreed upon by the said commissioners, to take into consideration the trade and commerce of the United States; to consider how far a uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony; and to report to the several states such an act relative to this great object as, when unanimously ratified by them, would enable the United States in Congress assembled effectually to provide for the same.”

That the state of Delaware had given similar powers to their commissioners, with this difference only, that the act to be

¹ September 14, 1786, Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1866), 1, 117-18.

framed in virtue of these powers is required to be reported "to the United States in Congress assembled, to be agreed to by them, and confirmed by the legislatures of every state."

That the state of New Jersey had enlarged the object of their appointment, empowering their commissioners "to consider how far a uniform system in their commercial regulations and *other important matters* might be necessary to the common interest and permanent harmony of the several states"; and to report such an act on the subject as, when ratified by them, "would enable the United States in Congress assembled effectually to provide for the exigencies of the Union."

That appointments of commissioners have also been made by the states of New Hampshire, Massachusetts, Rhode Island, and North Carolina, none of whom, however, have attended; but that no information has been received, by your commissioners, of any appointment having been made by the states of Connecticut, Maryland, South Carolina, or Georgia.

That the express terms of the powers to your commissioners supposing a deputation from all the states, and having for object the trade and commerce of the United States, your commissioners did not conceive it advisable to proceed on the business of their mission under the circumstance of so partial and defective a representation.

Deeply impressed, however, with the magnitude and importance of the object confided to them on this occasion, your commissioners cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken to effect a general meeting of the states, in a future convention, for the same and such other purposes as the situation of public affairs may be found to require.

If, in expressing this wish, or in intimating any other sentiment, your commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence that a conduct dictated by an anxiety for the welfare of the United States will not fail to receive an indulgent construction.

In this persuasion your commissioners submit an opinion, that the idea of extending the powers of their deputies to other

objects than those of commerce, which has been adopted by the state of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future convention. They are the more naturally led to this conclusion, as, in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the federal government, that, to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the federal system. . . .

Under this impression, your commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the Union, if the states, by whom they have been respectively delegated, would themselves concur, and use their endeavors to procure the concurrence of the other states, in the appointment of commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislatures of every state, will effectually provide for the same.

Though your commissioners could not with propriety address these observations and sentiments to any but the states they have the honor to represent, they have nevertheless concluded, from motives of respect, to transmit copies of this report to the United States in Congress assembled, and to the executive of the other states.

30. *Call for the Constitutional Convention.*¹

Whereas there is provision, in the Articles of Confederation and Perpetual Union, for making alterations therein, by the

¹ February 21, 1787. Elliot, *Debates*, I, 120.

assent of a Congress of the United States, and of the legislatures of the several states; and whereas experience hath evinced that there are defects in the present Confederation; as a mean to remedy which, several of the states, and particularly the state of New York, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these states a firm national government, —

Resolved, That, in the opinion of Congress, it is expedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and the preservation of the Union.

31. *Difficulties encountered by the Convention.*¹

Among the difficulties encountered by the convention a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form. Without substantially accomplishing this part of their undertaking, they would have very imperfectly fulfilled the object of their appointment or the expectation of the public; yet that it could not be easily accomplished will be denied by no one who is unwilling to betray his ignorance of the subject. . . .

Not less arduous must have been the task of marking the proper line of partition between the authority of the general and that of the State governments. Every man will be sensible of this difficulty, in proportion as he has been accustomed to contemplate and discriminate objects extensive and complicated in their nature. . . .

¹ *Federalist* (Ford ed.), No. 37 *passim*.

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces — the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science. . . .

Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea or so correct as not to include many, equivocally denoting different ideas. . . .

Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of its obscurity. The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.

To the difficulties already mentioned may be added the interfering pretensions of the larger and smaller States. We cannot err in supposing that the former would contend for a participation in the government fully proportioned to their superior wealth and importance; and that the latter would not be less tenacious of the equality at present enjoyed by them. We may well suppose that neither side would entirely yield to the other, and consequently that the struggle could be terminated only by compromise. It is extremely probable, also, that after the ratio of representation had been adjusted, this very compromise must have produced a fresh struggle between the same parties, to give such a turn to the organization of the government, and to the distribution of its powers, as would

increase the importance of the branches, in forming which they had respectively obtained the greatest share of influence. There are features in the Constitution which warrant each of these suppositions; and as far as either of them is well founded, it shows that the convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations.

Nor could it have been the large and small States only, which would marshal themselves in opposition to each other on various points. Other combinations, resulting from a difference of local position and policy, must have created additional difficulties. As every State may be divided into different districts, and its citizens into different classes, which give birth to contending interests and local jealousies, so the different parts of the United States are distinguished from each other by a variety of circumstances, which produce a like effect on a larger scale. And although this variety of interests, for reasons sufficiently explained in a former paper, may have a salutary influence on the administration of the government when formed, yet everyone must be sensible of the contrary influence, which must have been experienced in the task of forming it.

Would it be wonderful if, under the pressure of all these difficulties, the convention should have been forced into some deviations from that artificial structure and regular symmetry which an abstract view of the subject might lead an ingenious theorist to bestow on a Constitution planned in his closet or in his imagination? The real wonder is that so many difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been unexpected.

CHAPTER XII

THE CONSTITUTIONAL CONVENTION OF 1787

DELAY in the arrival of the delegates at Philadelphia prevented the formal organization of the Convention until May 27, when twenty-seven delegates from seven States presented themselves with their credentials. The credentials of the Maryland delegates are typical of all. Altogether, though not at any one time, there were in attendance fifty-five delegates from twelve States. Rhode Island was never represented. Simple rules of procedure were adopted. Perhaps the most important were those which provided that each State should have a single vote and that the discussions should be carried on in secrecy. The resolutions presented by Randolph were in reality the work of the Virginia delegation. They served as a basis for the deliberations of the Convention. Their general trend was toward the establishment of a national government, and they had the support for the most part of the large States. It was by way of protest that Paterson, of New Jersey, offered his plan, which was described as "purely federal." This New Jersey plan found general favor with the small States. The inability of the large and small States to agree upon the constitution of the two houses of the federal legislature led to the appointment of a grand committee of one delegate from each State. The recommendations of this committee, commonly known as "the great compromise," were eventually adopted by the Convention. This compromise did, in fact, make possible the further work of the Convention, but it is only one of many compromises which made the Constitution.

32. *Opening Session of the Federal Convention.*¹

In foederal-Convention.

On Monday the 14th of May. A.D. 1787. and in the eleventh year of the independence of the United States of America, at the State-House in the city of Philadelphia — in virtue of appointments from their respective States, sundry Deputies to the foederal-Convention appeared — but, a majority of the States not being represented, the Members present adjourned from day to day until friday the 25th of the said month, when, in virtue of the said appointments appeared from the States of (names omitted) . . .

¹ *Journal in Farrand's Records of the Federal Convention*, 1, 1-2.

In foederal-Convention Friday May 25. 1787.

It was moved by the honorable Robert Morris Esquire, One of the Deputies from Pennsylvania, that a President be elected by ballot, which was agreed to — and thereupon he nominated, on the part of the said State,

His Excellency George Washington Esquire

The Members then proceeded to ballot on behalf of their respective States — and, the ballots being taken, it appeared that the said George Washington was unanimously elected — and he was conducted to the chair by

The honorable Robert Morris, and John Rutledge Esquires. The President then proposed to the House that they should proceed to the election of a Secretary — and, the ballots being taken, it appeared that

William Jackson Esquire was elected.

The following credentials were produced and read —

[Be it enacted by the General Assembly of Maryland, That the Hon. James M'Henry, Daniel of St. Thomas Jenifer, Daniel Carroll, John Francis Mercer, and Luther Martin, Esqrs., be appointed and authorized, on behalf of this state, to meet such deputies as may be appointed and authorized, by any other of the United States, to assemble in Convention at Philadelphia, for the purpose of revising the federal system, and to join with them in considering such alterations and further provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union; and in reporting such an act for that purpose, to the United States in Congress assembled, as, when agreed to by them, and duly confirmed by the several states, will effectually provide for the same; and the said deputies, or such of them as shall attend the said Convention, shall have full power to represent this state for the purposes aforesaid; and the said deputies are hereby directed to report the proceedings of the said Convention, and any act agreed to therein, to the next session of the General Assembly of this state.]¹

¹ The credentials of the delegates are not inserted in the *Journal*. The above is taken from Elliot's *Debates*, 1, 131.

The House then appointed Nicholas Weaver Messenger, and Joseph Fry Door-Keeper.

On motion of Mr. C. Pinckney — ordered that a Committee be appointed to draw up rules to be observed as the standing Orders of the Convention — and to report the same to the House. — a Committee by ballot was appointed of

Mr. Wythe, Mr. Hamilton, and Mr. Pinckney.

And then the House adjourned 'till monday next at 10 o'clock A.M.

33. *The Randolph Resolutions.*¹

1. Resolved that the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely. "common defence, security of liberty and general welfare."

2. Resd. therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. Resd. that the National Legislature ought to consist of two branches.

4. Resd. that the members of the first branch of the National Legislature ought to be elected by the people of the several States every for the term of ; to be of the age of years at least, to receive liberal stipends by which they may be compensated for the devotion of their time to public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of after its expiration; to be incapable of re-election for the space of after the expiration of their term of service, and to be subject to recall.

5. Resold. that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures, to be of the age of years at least; to hold

¹ May 29, 1787. Farrand, *Records of the Federal Convention*, I, 20-22.

their offices for a term sufficient to ensure their independency, to receive liberal stipends, by which they may be compensated for the devotion of their time to public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of after the expiration thereof.

6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of the Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.

7. Resd. that a National Executive be instituted; to be chosen by the National Legislature for the term of years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.

8. Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by of the members of each branch.

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9. Resd. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behavior; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

10. Resolv'd. that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government & Territory or otherwise, with the consent of a number of voices in the National legislature less than the whole.

11. Resd. that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State.

12. Resd. that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the articles of Union shall be adopted, and for the completion of all their engagements.

13. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.

14. Resd. that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.

15. Resd. that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or

times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon.

34. *The Paterson Resolutions.*¹

1. Resd. that the articles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union.

2. Resd. that in addition to the powers vested in the U. States in Congress, by the present existing articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the U. States, by Stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general post-Office, to be applied to such federal purposes as they shall deem proper & expedient; to make rules & regulations for the collection thereof; and the same from time to time, to alter & amend in such manner as they shall think proper: to pass Acts for the regulation of trade & commerce as well with foreign nations as with each other: provided that all punishments, fines, forfeitures & penalties to be incurred for contravening such acts rules and regulations shall be adjudged by the Common law Judiciarys of the State in which any offence contrary to the true intent & meaning of such Acts rules & regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits & prosecutions for that purpose in the superior Common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law & fact in rendering judgment, to an appeal to the Judiciary of the U. States.

3. Resd. that whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the articles of Confederation, the United States in Congs. be

¹ June 15, 1787. Farrand, *Records of the Federal Convention*, I, 242-45.

authorized to make such requisitions in proportion to the whole number of white & other free citizens & inhabitants of every age sex and condition including those bound to servitude for a term of years & three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that if such requisitions be not complied with, in the time specified therein, to direct the collection thereof in the non complying States & for that purpose to devise and pass acts directing & authorizing the same; provided that none of the powers hereby vested in the U. States in Congs. shall be exercised without the consent of at least States, and in that proportion if the number of Confederate States should hereafter be increased or diminished.

4. Resd. that the U. States in Congs. be authorized to elect a federal Executive to consist of persons, to continue in office for the term of years, to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons composing the Executive at the time of such increase or diminution, to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service and for years thereafter; to be ineligible a second time, & removeable by Congs. on application by a majority of the Executives of the several States; that the Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, & to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General, or in other capacity.

5. Resd. that a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive, & to hold their offices during good behavior, to receive punctually at stated times a fixed compensation for their services in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution; that the Judiciary so established shall

have authority to hear & determine in the first instance on all impeachments of federal officers, & by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue: that none of the Judiciary shall during the time they remain in Office be capable of receiving or holding any other office or appointment during their time of service, or for thereafter.

6. Resd. that all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary not with standing; and that if any State, or any body of men in any State shall oppose or prevent ye. carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederate States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.

7. Resd. that provision be made for the admission of new States into the Union.

8. Resd. the rule for naturalization ought to be the same in every State.

9. Resd. that a Citizen of one State committing an offence in another State of the Union, shall be deemed guilty of the same offence as if it had been committed by a Citizen of the State in which the Offence was committed.

35. *The Great Compromise.*¹

The *grand committee* met. Mr. Gerry was chosen chairman.

The committee proceeded to consider in what manner they should discharge the business with which they were entrusted. By the proceedings in the convention they were so equally divided on the important question of *representation in the two branches*, that the idea of a conciliatory adjustment must have been in contemplation of the house in the appointment of this committee. But still how to effect this salutary purpose was the question. Many of the members, impressed with the utility of a general government, connected with it the indispensable necessity of a representation from the states *according to their numbers and wealth*; while others, equally tenacious of the rights of the states, would admit of no other representation but such *as was strictly federal*, or in other words, *equality of suffrage*. This brought on a discussion of the principles on which the house had divided, and a lengthy recapitulation of the arguments advanced in the house in support of these opposite propositions. As I had not openly explained my sentiments on any former occasion on this question, but constantly in giving my vote, *showed my attachment to the national government on federal principles, I took this occasion to explain my motives — (see a copy of my speech hereunto annexed.)*

These remarks gave rise to a motion of Dr. Franklin, which after some modification was agreed to, and made the basis of the following report to the committee.

The committee to whom was referred the eighth resolution, reported from the committee of the whole house, and so much of the seventh as had not been decided on, submit the following report:

That the subsequent propositions be recommended to the convention, on condition that both shall be generally adopted.

That in the first branch of the legislature, each of the states now in the union, be allowed one member for every 40,000

¹ Yates's *Notes*, July 3, 1787. Farrand, *Records of the Federal Convention*, 1, 522-23.

inhabitants, of the description reported in the seventh resolution of the committee of the whole house — That each state, not containing that number, shall be allowed one member.

That all bills for raising or apportioning money, and for fixing salaries of the officers of government of the United States, shall originate in the first branch of the legislature, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated in the first branch.

That in the second branch of the legislature, *each state shall have an equal vote.*

CHAPTER XIII

THE CONSTITUTION OF THE UNITED STATES

ANY attempt to analyze the Constitution in systematic fashion must fail, for the simple reason that the Constitution is not a theoretically conceived nor a logically drafted document. It was not made by doctrinaires, but by hard-headed men of affairs. They had met to remedy certain definite defects in the government set up by the Articles of Confederation. For the most part, the remedies which they applied were such as they knew by practical experience. They invented little; but they made some novel adjustments, and they frequently sacrificed logical completeness and precision to practical exigencies. As Professor Dicey well says, a federal State is only "a political contrivance intended to reconcile national unity and power with the maintenance of state rights." The constitution of such a State must inevitably be a "complicated contract," worked out by mutual concessions between the parties concerned.

36. The Constitution as adopted.¹

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years

¹ *Revised Statutes of the United States* (1878), 17-27.

a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make tem-

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porary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House

shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the Credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by secur-

ing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and Punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be

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imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Lawsshall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay.

ARTICLE II.

SECTION. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum

for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — “I do solemnly swear (or “affirm) that I will faithfully execute the Office of President of “the United States, and will to the best of my Ability, preserve, “protect and defend the Constitution of the United States.”

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the

United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Applica-

tion of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names . . .

CHAPTER XIV

THE RATIFICATION OF THE CONSTITUTION

THE finished Constitution probably satisfied no one in the Convention. Most of the delegates, to be sure, were ready to sign the instrument, but many did so with misgivings; some emphatically withheld their assent. At Franklin's suggestion, a form of ratification by the Convention was agreed upon which would give a semblance of unanimity: "Done in the Convention by the unanimous consent of the States present." It was quite in accord with the manner in which the calling of the Convention had been forced upon Congress, that the Constitution was sent to Congress with definite prescriptions as to its ratification by the States. In open disregard of the Articles of Confederation, of which it could be legally only a revision, the Constitution was to become operative when ratified by nine of the thirteen States. Congress was thus invited to violate the fundamental law under which alone it had legal existence. The process of ratification in each State was similar to that followed in Georgia, except that the conventions were variously constituted, as one or another system of apportionment prevailed. Madison's defense of the new Constitution as neither a national nor a federal constitution, but a composition of both, probably represents the view which most of the framers took of their handiwork.

37. *Transmission of the New Constitution to Congress.*¹

Resolved, That the preceding constitution be laid before the United States in congress assembled, and that it is the opinion of this convention, that it should afterwards be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting thereto, and ratifying the same, should give notice thereof to the United States in congress assembled.

Resolved, That it is the opinion of this convention, that as soon as the conventions of nine States shall have ratified this constitution, the United States in congress assembled should fix a day on which electors should be appointed by the states which shall have ratified the same, and a day on which the

¹ Elliot, *Debates*, v, 541.

electors should assemble to vote for the president, and the time and place for commencing proceedings under this constitution. That after such publication the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for the election of the president, and should transmit their votes certified, signed, sealed, and directed, as the constitution requires, to the secretary of the United States in congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president of the senate, for the sole purpose of receiving, opening, and counting the votes for president; and that after he shall be chosen, the congress, together with the president, should without delay proceed to execute this constitution.

By the unanimous order of the convention.

George Washington, President.

38. *Ratification of the Constitution by the State of Georgia.*¹

In Convention, Wednesday, January 2, 1788.

To all to whom these presents shall come, Greeting:

Whereas the form of a Constitution for the government of the United States of America, was, on the 17th day of September, 1787, agreed upon and reported to Congress by the deputies of the said United States convened in Philadelphia, which said Constitution is written in the words following, to wit: . . .

And whereas the United States in Congress assembled did on the 28th day of September, 1787, *resolve*, unanimously, "That the said report, with the resolution and letter accompanying the same, be transmitted to the several legislatures, in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention made and provided in that case."

And whereas the legislature of the State of Georgia did, on the 26th day of October, 1787, in pursuance of the above recited resolution of Congress, *resolve*, that a convention be elected on the day of the next general election, and in the same manner

¹ Elliot, *Debates*, 1, 323-24.

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that representatives are elected; and that the said Convention consist of not more than three members from each county; and that the said convention should meet at Augusta, on the 4th Tuesday in December then next, and, as soon thereafter as convenient, proceed to consider the said report and resolutions, and to adopt or reject any part or the whole thereof; —

Now know ye, that we, the delegates of the people of the State of Georgia, in convention met, pursuant to the resolutions of the legislature aforesaid, having taken into our serious consideration the said Constitution, have assented to, ratified, and adopted, and by these presents do, in virtue of the powers and authority to us given by the people of the said State, for that purpose, for and in behalf of ourselves and our constituents, fully and entirely assent to, ratify, and adopt, the said Constitution.

Done in Convention, at Augusta, in the said State, on the 2d day of January, in the year of our Lord 1788, and of the independence of the United States the 12th.

In witness whereof, we have hereunto subscribed our names.

John Wereat, *President,*
and delegate for the county of Richmond.

39. *The Constitution — National or Federal?*¹

The first question that offers itself is, whether the general form and aspect of the Government be strictly republican. It is evident that no other form would be reconcilable with the genius of the People of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the Convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What then are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by

¹ *Federalist*, No. 38 (Ford ed.), 245-52 *passim*.

political writers, to the Constitutions of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the People, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the People is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The Government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort, for a criterion, to the different principles on which different forms of Government are established, we may define a republic to be, or at least may bestow that name on, a Government which derives all its powers directly or indirectly from the great body of the People, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a Government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their Government the honorable title of republic. It is *sufficient* for such a Government, that the persons administering it be appointed, either directly or indirectly, by the People; and that they hold their appointments by either of the tenures just specified; otherwise every Government in the United States, as well as every other popular Government that has been or can be well organized or well executed, would be degraded from the republican character. According to the Constitution of every State in the Union, some or other of the officers of Government are appointed

indirectly only by the People. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the coördinate branches of the Legislature. According to all the Constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the Legislative and Executive departments, to a period of years. According to the provisions of most of the Constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the Judiciary department are to retain their offices by the firm tenure of good behavior. . . .

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the Federal and the State Governments; and in its express guaranty of the republican form to each of the latter.

"But it was not sufficient," say the adversaries of the proposed Constitution, "for the Convention to adhere to the republican form. They ought, with equal care, to have preserved the *Federal* form, which regards the Union as a *Confederacy* of sovereign States; instead of which, they have framed a *National* Government, which regards the Union as a consolidation of the States." And it is asked by what authority this bold and radical innovation was undertaken? The handle which has been made of this objection requires, that it should be examined with some precision.

Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, First, to ascertain the real character of the Government in question; Secondly, to inquire how far the Convention were authorized to propose such a Government; and Thirdly, how far the duty they owed to their country could supply any defect of regular authority.

First. In order to ascertain the real character of the Government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its

ordinary powers are to be drawn; to the operation of these powers; to the extent of them; and to the authority by which future changes in the Government are to be introduced.

On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the People of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the People, not as individuals composing one entire Nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, — the authority of the People themselves. The act, therefore, establishing the Constitution, will not be a *National*, but a *Federal* act.

That it will be a Federal, and not a National act, as these terms are understood by the objectors, the act of the People, as forming so many independent States, not as forming one aggregate Nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the People of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the Legislative authority, but by that of the People themselves. Were the People regarded in this transaction as forming one Nation, the will of the majority of the whole People of the United States would bind the minority, in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the People of the United States. Neither of these rules has been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *Federal*, and not a *National* Constitution.

The next relation is, to the sources from which the ordinary

powers of Government are to be derived. The House of Representatives will derive its powers from the People of America; and the People will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is *National*, not *Federal*. The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the Government is *Federal*, not *National*. The Executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the Legislature which consists of the National representatives; but in this particular act, they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the Government, it appears to be of a mixed character, presenting at least as many *Federal* as *National* features.

The difference between a Federal and National Government, as it relates to the *operation of the Government*, is supposed to consist in this, that in the former, the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the Nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *National*, not the *Federal* character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the National countenance of the Government on this side seems to be disfigured by a few Federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the Government on the People, in their

individual capacities, in its ordinary and most essential proceedings, may, on the whole, designate it, in this relation, a *National* Government.

But if the Government be National with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its power. The idea of a National Government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful Government. Among a People consolidated into one Nation, this supremacy is completely vested in the National Legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal Legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed Government cannot be deemed a *National* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the General Government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the General, rather than under the local Governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

If we try the Constitution by its last relation, to the author-

ity by which amendments are to be made, we find it neither wholly *National*, nor wholly *Federal*. Were it wholly *National*, the supreme and ultimate authority would reside in the *majority* of the People of the Union; and this authority would be competent at all times, like that of a majority of every *National* society, to alter or abolish its established Government. Were it wholly *Federal*, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the Plan of the Convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *States*, not by *citizens*, it departs from the *National*, and advances towards the *Federal* character: in rendering the concurrence of less than the whole number of States sufficient, it loses again the *Federal*, and partakes of the *National* character.

The proposed Constitution, therefore, is, in strictness, neither a *National* nor a *Federal* Constitution, but a composition of both. In its foundation it is *Federal*, not *National*: in the sources from which the ordinary powers of the Government are drawn, it is partly *Federal*, and partly *National*: in the operation of these powers, it is *National*, not *Federal*: in the extent of them, again, it is *Federal*, not *National*: and, finally, in the authoritative mode of introducing amendments, it is neither wholly *Federal* nor wholly *National*.

CHAPTER XV

THE FIRST AMENDMENTS TO THE CONSTITUTION

AMENDMENTS to nearly every article of the new Constitution were proposed in the ratifying conventions and in the press; but the objection most commonly urged was that the Constitution contained no declaration of rights. To remove this objection, Madison proposed in the first session of Congress the addition of articles which, without altering the framework of the instrument, should constitute a bill of rights. Of the twelve amendments proposed by the select committee to which Madison's propositions were referred, ten were ratified and became a part of the Constitution. The Eleventh Amendment was adopted as a direct result of the suit brought against the "sovereign State of Georgia" in 1793.

40. *A Proposal to Amend the New Constitution.*¹

It cannot be a secret to the gentlemen in this House, that, notwithstanding the ratification of this system of Government by eleven of the thirteen United States, in some cases unanimously, in others by large majorities; yet still there is a great number of our constituents who are dissatisfied with it; among whom are many respectable for their talents and patriotism, and respectable for the jealousy they have for their liberty, which, though mistaken in its object, is laudable in its motive. There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of Federalism, if they were satisfied on this one point. We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution. The acquiescence which our fellow-citizens show under the Government, calls upon us for a like return of moderation. But perhaps there is a stronger motive than this for our going into a consideration of the subject. It is to provide those securities for liberty which are required by

¹ Speech of James Madison in the House of Representatives, June 8, 1789. *Annals of Congress*, 1 Cong., 1 Sess., 449-57 *passim*.

a part of the community; I allude in a particular manner to those two States that have not thought fit to throw themselves into the bosom of the Confederacy. It is a desirable thing, on our part as well as theirs, that a reunion should take place as soon as possible. I have no doubt, if we proceed to take those steps which would be prudent and requisite at this juncture, that in a short time we should see that disposition prevailing in those States which have not come in, that we have seen prevailing in those States which have embraced the constitution.

But I will candidly acknowledge, that, over and above all these considerations, I do conceive that the constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done, while no one advantage arising from the exercise of that power shall be damaged or endangered by it. We have in this way something to gain, and, if we proceed with caution, nothing to lose. And in this case it is necessary to proceed with caution; for while we feel all these inducements to go into a revisal of the constitution, we must feel for the constitution itself, and make that revisal a moderate one. I should be unwilling to see a door opened for a reconsideration of the whole structure of the Government — for a reconsideration of the principles and the substance of the powers given; because I doubt, if such a door were opened, we should be very likely to stop at that point which would be safe to the Government itself. But I do wish to see a door opened to consider, so far as to incorporate those provisions for the security of rights, against which I believe no serious objection has been made by any class of our constituents: such as would be likely to meet with the concurrence of two-thirds of both Houses, and the approbation of three-fourths of the State Legislatures. I will not propose a single alteration which I do not wish to see take place, as intrinsically proper in itself, or proper because it is wished for by a respectable number of my fellow-citizens; and therefore I shall not propose a single alteration but is likely to

meet the concurrence required by the constitution. There have been objections of various kinds made against the constitution. Some were levelled against its structure because the President was without a council; because the Senate, which is a legislative body, had judicial powers in trials on impeachments; and because the powers of that body were compounded in other respects, in a manner that did not correspond with a particular theory; because it grants more power than is supposed to be necessary for every good purpose, and controls the ordinary powers of the State Governments. I know some respectable characters who opposed this Government on these grounds; but I believe that the great mass of the people who opposed it, disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow-citizens think these securities necessary. . . .

It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of the particular States. It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides this security, there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power

on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people's liberty. I conclude, from this view of the subject, that it will be proper in itself, and highly politic, for the tranquillity of the public mind, and the stability of the Government, that we should offer something, in the form I have proposed, to be incorporated in the system of Government as a declaration of the rights of the people.

41. *Resolution of Congress for the Amendment of the Constitution.*¹

The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution; —

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both houses concurring, that the following articles be proposed by the legislatures of the several states, as amendments to the Constitution of the United States, all or any of which articles, when ratified by three fourths of the said legislatures, to be valid, to all intents and purposes, as part of the said Constitution. . . . [Of the twelve proposed, ten were adopted and became a part of the Constitution as follows:]

42. *The First Ten Amendments.*²

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

¹ Elliot, *Debates*, 1, 338.

² These amendments went into effect November 3, 1791. *Revised Statutes* (1878), 28-30.

ARTICLE II.

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

43. *Chisholm, Executor, v. Georgia.*¹

Mr. Chief Justice Jay delivered the opinion of the Court:

The question we are now to decide has been accurately stated namely, is a State suable by individual citizens of another State?

It is said that Georgia refuses to appear and answer to the plaintiff in this action, because she is a sovereign State, and therefore not liable to such actions. In order to ascertain the merits of this objection, let us inquire: — 1st. In what sense Georgia is a sovereign State. 2nd. Whether suability is incompatible with such sovereignty. 3rd. Whether the Constitution, to which Georgia is a party, authorizes such an action against her.

1st. . . . the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State. . . .

¹ Supreme Court of the United States, 1793. 2 Dallas, 419.

2nd. The second object of inquiry now presents itself, namely, whether suability is compatible with State sovereignty. . . .

If there be any such incompatibility as is pretended, whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this: Any one State in the Union may sue all the people of another State. It is plain then that a State may be sued, and hence it plainly follows that suability and State sovereignty are not incompatible. . . . But why should it be more incompatible that all the people of a State should be sued by one citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike, and the consequences of a judgment alike. Nor can I observe any greater inconveniences in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number in an inferior light. But if any reliance be made on this inferiority, as an objection, at least one-half of its force is done away by this fact, namely, that it is conceded that a State may appear in this court as plaintiff against a single citizen as defendant; and the truth is that the State of Georgia is at this moment prosecuting an action in this court against two citizens of South Carolina. . . .

3rd. Let us now proceed to inquire whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another State. . . .

The question now before us renders it necessary to pay particular attention to that part of the second section which extends the judicial power "to controversies between a State and citizens of another State." It is contended that this ought to be construed to reach none of these controversies, excepting those in which a State may be plaintiff. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.

This extension of power is remedied, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise, and good, that not only the controversies in which a State is plaintiff, but also those in which a State is defendant, should be settled; both cases, therefore, are within the reason

of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: "The judicial power of the United States shall extend to controversies between a State and citizens of another State." If the constitution really meant to extend these powers only to those controversies in which a State might be plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the constitution. It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the constitution. What is it to the cause of justice, and how can it affect the definition of the word controversy, whether the demands which cause the dispute are made by a State against citizens of another State, or by the latter against the former? When power is thus extended to a controversy, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists. . . .

For the reasons before given, I am clearly of opinion that a State is suable by citizens of another State.

44. *The Eleventh Amendment.*¹

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

¹ This amendment went into effect January 8, 1798. *Revised Statutes* (1878), 30.

CHAPTER XVI

THE GOVERNMENT OF FEDERAL TERRITORIES

THE Ordinance of 1787, passed originally by the Congress of the Confederacy and reenacted by the new Congress, must be reckoned among the great acts of constructive statesmanship of this period. It is important not only because it projected a form of territorial government which served as a model for succeeding territorial acts, but also because it renewed in definite form the earlier pledge that States carved out of this territory should be admitted to membership in the Union on an equal footing with the original States. The assurance was made doubly sure that Congress would not hold the Northwest as a dependency, but would prepare it for eventual statehood. The foundations were thus laid for the American process of continental colonization.

45. *The Ordinance of 1787 for the Northwest Territory.*¹

SECTION 1. *Be it ordained by the United States in Congress assembled,* That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

SEC. 2. *Be it ordained by the authority aforesaid,* That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them: and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the

¹ *Revised Statutes of the United States* (1878), 13-16.

personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

SEC. 3. *Be it ordained by the authority aforesaid*, That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein in one thousand acres of land, while in the exercise of his office.

SEC. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court.

who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

SEC. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

SEC. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

SEC. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

SEC. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

SEC. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and

place, to elect representatives from their counties or townships, to represent them in the general assembly: *Provided*, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided, also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

SEC. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

SEC. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate

two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

SEC. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

SEC. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

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SEC. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I.

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.

ARTICLE II.

The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

ARTICLE III.

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without

their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV.

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ARTICLE V.

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: . . . *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

ARTICLE VI.

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid. . . .

PART THREE. THE ESTABLISHMENT OF THE FEDERAL GOVERNMENT

CHAPTER XVII

PRESIDENT AND CONGRESS

THE Constitution provided a framework of Federal Government. To Congress fell the task of providing for the proper functioning of the organs of government and for their inter-action. Wherever possible, Congress revived colonial precedents and practices. The President's speech at the opening of Congress was not so much an imitation of the British speech from the throne as a continuance of a formality to which colonial assemblies had long been accustomed. On the other hand, it was necessary to clothe the new presidential office with appropriate dignity and to secure for it prestige at home and abroad. Tradition suggested the revival of British forms and titles; but popular dislike of monarchy and its trappings might not be disregarded. No one expressed more faithfully this popular democratic spirit than Senator William Maclay of Pennsylvania, whose journal, in the absence of official records of the early debates in the Senate, becomes a source of prime importance. It is interesting to find Jefferson urging Washington to exercise the veto — a power which no English sovereign had used since the days of Queen Anne.

46. *The Inauguration of Washington.*¹

30th April, Thursday. — This is a great, important day. Goddess of Etiquette assist me while I describe it. The Senate stood adjourned to half after eleven o'clock. About ten, dressed in my best clothes; went for Mr. Morris' Lodgings; but met his son, who told me that his father would not be in town until Saturday. Turned into the Hall. The crowd already great. The Senate met. The Vice-President rose in the most solemn manner. . . .

"Gentlemen: I wish for the direction of the Senate. The President will, I suppose, address the Congress. How shall I behave? How shall we receive it? Shall it be standing or sitting?"

¹ Maclay, *Journal of William Maclay*, 7-9.

Here followed a considerable talk from him, which I could make nothing of. Mr. Lee began with the House of Commons (as is usual with him), then the House of Lords; then the King, and then back again. The result of his information was, that the Lords sat, and the Commons stood, on the delivery of the King's speech. Mr. Izard got up and told how often he had been in the House of Parliament. He said a great deal of what he had seen there; made, however, this sagacious discovery, that the Commons stood because they had no seats to sit on, being arrived at the House of Lords. It was discovered, after some time, that the King sat, too, and had his robes and crown on.

Mr. Adams got up again, and said he had been very often, indeed, at the Parliament on those occasions, but there always was such a crowd, and *ladies along*, he could not say how it was. Mr. Carroll got up to declare that he thought it of no consequence how it was in Great Britain — they were no rule to us, &c. But all at once the Secretary, who had been out, whispered to the Chair that the Clerk from the Representatives was at the door with a communication. Gentlemen of the Senate, how shall he be received? A silly kind of resolution of the committee on that business had been laid on the table some days ago. The amount of it was, that each House should communicate to the other what and how they chose; it concluded, however, something in this way: that everything should be done with all the *propriety* that was *proper*. The question was, Shall this be adopted, that we may know how to receive the Clerk? It was objected; this will throw no light on the subject; it will leave you where you are. Mr. Lee brought the House of Commons before us again. He reprobated the rule; declared that the Clerk should not come within the bar of the House; that the proper mode was for the Sergeant-at-Arms, with the mace on his shoulder, to meet the Clerk at the door and receive his communication; we are not, however, provided for this ceremonious way of doing business, having neither mace nor Sergeant, nor Masters in Chancery, who carry down bills from the English Lords.

Mr. Izard got up and labored unintelligibly to show the great distinction between a communication and a delivery of a thing; but he was not minded. Mr. Ellsworth showed plainly enough that if the Clerk was not permitted to deliver the communication, the Speaker might as well send it enclosed. Repeated accounts came [that] the Speaker and Representatives were at the door. Confusion ensued; the members left their seats. Mr. Reed rose and called the attention of the Senate to the neglect that had been shown to Mr. Thomson, late Secretary. Mr. Lee rose to answer him; but I could not hear one word he said. The Speaker was introduced, followed by the Representatives. Here we sat an hour and ten minutes before the President arrived — this delay was owing to Lee, Izard, and Dalton, who had stayed with us until the Speaker came in, instead of going to attend the President. The President advanced between the Senate and Representatives, bowing to each. He was placed in the chair by the Vice-President; the Senate, with their President, on the right, the Speaker and Representatives on his left. The Vice-President rose, and addressed a short sentence to him. The import of it was, that he should now take the oath of office as President. He seemed to have forgot half of what he was to say, for he made a dead pause and stood for some time, to appearance, in a vacant mood. He finished with a formal bow, and the President was conducted out of the middle window into the gallery, and the oath was administered by the Chancellor. Notice that the business was done was communicated to the crowd by proclamation, etc., who gave three cheers, and repeated it on the President's bowing to them.

As the company returned into the chamber, the President took the chair and the Senate and Representatives their seats. He rose and all rose, and addressed them. This great man was agitated and embarrassed more than ever he was by the leveled cannon or pointed musket. He trembled, and several times could scarce make out to read, though it must be supposed he had often read it before. He put part of the fingers of his left hand into the side of what I think the tailors call the fall of the

breeches, changing the paper into his left [right] hand. After some time he then did the same with some of the fingers of his right hand. When he came to the words *all the world*, he made a flourish with his right hand which left rather an ungainly impression. I sincerely, for my part, wished all set ceremony in the hands of the dancing masters, and that this first of men had read off his address in the plainest manner, without ever taking his eyes from the paper; for I felt hurt that he was not first in everything. He was dressed in deep brown, with metal buttons, with an eagle on them, white stockings, a bag, and sword.

From the Hall there was a grand procession to St. Paul's church, where prayers were said by the Bishop. The procession was well conducted and without accident, as far as I have heard. The militia were all under arms, lined the street near the church, made a good figure, and behaved well.

47. *The President's Speech and the Address of the House.*¹

House of Representatives.

Tuesday, October 25, 1791.

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A message being received from the Senate, stating that they were ready to receive the Communication from the President of the United States, the Speaker, attended by the members of the House, withdrew to the Senate Chamber for the purpose of receiving the same.

On the return of the members, the Speaker laid before the House a copy of the Speech delivered by the President. . . .

The Speech was committed to a Committee of the Whole to-morrow.

Wednesday, October 26.

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The House then went into Committee of the Whole, on the President's Speech, Mr. Muhlenberg in the chair.

The Speech being read, Mr. Vining moved a resolution, of which the following is the purport:

¹ *Annals of Congress*, 2 Cong., 1 Sess., 143-47 *passim*.

“Resolved, That it is the opinion of this committee that an Address should be presented to the President of the United States by the House of Representatives, in answer to his Speech, to congratulate him on the prosperous situation of the United States, expressive of the approbation of the House of the wise and prudent measures he has pursued during their recess, in the execution of the duties committed to his charge; promising speedy attention to the important and momentous objects recommended to their consideration, and expressing their approbation of the humane and effectual steps taken, under his direction, for the defence of the western frontiers.”

This resolution was objected to by Messrs. Laurance, Sedgwick, Smith, of South Carolina, and Livermore, upon the principle, that it expressed the sense of the House upon points which required further information and investigation before the House could, with propriety, determine. . . .

Several modifications were proposed to the resolution, which was finally agreed to, as follows:

“Resolved, That it is the opinion of this Committee that a respectful address ought to be presented by the House of Representatives to the President of the United States, in answer to his Speech to both Houses of Congress at the commencement of this session, containing assurances that this House will take into consideration the various and important matters recommended to their attention.”

Mr. Madison, Mr. Laurance, and Mr. Smith, of South Carolina, were appointed a committee to prepare an Address, pursuant to the resolution. . . .

Thursday, October 27.

Mr. Madison, from the committee appointed, reported an Address to the President of the United States, in answer to his speech to both Houses of Congress; which was read, and ordered to be committed to a Committee of the whole House immediately.

The House accordingly resolved itself into a Committee of the Whole House on the said Address; and, after some time

spent therein, Mr. Muhlenberg reported that the committee had had the said Address under consideration, and made no amendment thereto. Whereupon, it

Resolved, unanimously, That this House doth agree to the said Address, in the words following: . . .

Resolved, That the Speaker, attended by the House, do present the said Address; and that Mr. Madison, Mr. Laurance, and Mr. Smith, of South Carolina, be a committee to wait on the President to know when and where it will be convenient for him to receive the same. . . .

Mr. Madison, from the committee appointed to wait on the President of the United States, to know when and where it will be convenient for him to receive the Address of this House, in answer to his Speech to both Houses of Congress, reported that the committee had waited on the President, who signified to them that it would be convenient to him to receive the said Address at twelve o'clock to-morrow, at his own house.

Friday, October 28.

The Speaker, attended by the House, then withdrew to the President of the United States, and there presented to him the Address of this House, in answer to his Speech to both Houses of Congress; to which the President made the following reply:

Gentlemen:

The pleasure I derive from an assurance of your attention to the objects I have recommended to you is doubled by your concurrence in the testimony I have borne to the prosperous condition of our public affairs.

Relying on the sanctions of your enlightened judgment, and on your patriotic aid, I shall be the more encouraged in all my endeavors for the public weal, and particularly in those which may be required on my part for executing the salutary measures I anticipate from your present deliberations.

48. *Origin of the First Veto Message.*¹

Apr. 6. [1792.] The President called on me before breakfast & first introduced some other matters, then fell on the representn bill which he had now in his possn for the 10th day. I had before given him my opn in writing that the method of apportionmt was contrary to the constn. He agreed that it was contrary to the common understanding of that instrument, & to what was understood at the time by the makers of it: that yet it would bear the constn which the bill put, & he observed that the vote for & against the bill was perfectly geographical, a northern agt a southern vote, & he feared he should be thought to be taking side with a southern party. I admitted this motive of delicacy, but that it should not induce him to do wrong: urged the dangers to which the scramble for the fractionary members would always lead. He here expressed his fear that there would ere long, be a separation of the union; that the public mind seemed dissatisfied & tending to this. He went home, sent for Randolph the Atty Genl. desired him to get Mr. Madison immediately & come to me, & if we three concurred in opn that he should negative the bill, he desired to hear nothing more about it but that we would draw the instrument for him to sign. They came. Our minds had been before made up. We drew the instrument. Randolph carried it to him & told him we all concurred in it. He walked with him to the door, and as if he still wished to get off, he said, "& you say you approve of this yourself." "Yes, Sir, says Randolph I do upon my honor." He sent it in to the H. of Representatives instantly. A few of the hottest friends of the bill expressed passion, but the majority were satisfied, & both in and out of doors it gave pleasure to have at length an instance of the negative being exercised.

49. *The Veto Message in the House of Representatives.*²

House of Representatives.

Thursday, April 5, 1792.

A Message was received from the President of the United

¹ *Writings of Thomas Jefferson* (Ford ed.), I, 192.² *Annals of Congress*, 2 Cong. 1 Sess., 539-41, *passim*.

States returning to the House the bill passed by the two Houses entitled "An act for an Apportionment of Representatives among the several States according to the first Enumeration," and presented to the President for his approbation on Monday, the 26th of March; to which bill the President having made objections, the said objections were read, and ordered to be entered at large on the Journal, as follows:

" United States, *April 5, 1792.*

"Gentlemen of the House of Representatives:

"I have maturely considered the act passed by the two Houses entitled 'An act for an Apportionment of Representatives among the several States, according to the first Enumeration;' and I return it to your House, wherein it originated, with the following objections:

"First. The Constitution has prescribed that Representatives shall be apportioned among the several States according to their respective numbers; and there is no one proportion or divisor which, applied to the respective numbers of the States, will yield the number and allotment of Representatives proposed by the bill.

"Second. The Constitution has also provided that the number of Representatives shall not exceed one for every thirty thousand; which restriction is by the context, and by fair and obvious construction, to be applied to the separate and respective numbers of the States; and the bill has allotted to eight of the States more than one for every thirty thousand.

" G. WASHINGTON."

Friday, April 6.

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The House proceeded to reconsider the bill passed by the two Houses entitled "An act for an Apportionment of Representatives among the several States, according to the first Enumeration," which was presented for approbation on Monday, the 26th of March, and returned by the President yesterday, with objections.

The said bill was read, and is as follows:

The President's objections were also read; and, after debate on the subject-matter of the said bill, the question "That the House, on reconsideration, do agree to pass the bill," was determined in the mode prescribed by the Constitution of the United States, and passed in the negative — yeas 23, nays 33 — as follows: . . .

And so the said bill was rejected, two-thirds of the House not agreeing to pass the same.

50. *President Jefferson's Innovation.*¹

December 8, 1801.

Sir: The circumstances under which we find ourselves at this place rendering inconvenient the mode heretofore practised, of making by personal address the first communications between the Legislative and Executive branches, I have adopted that by Message, as used on all subsequent occasions through the session. In doing this I have had principal regard to the convenience of the Legislature, to the economy of their time, to their relief from the embarrassment of immediate answers, on subjects not yet fully before them, and to the benefits thence resulting to the public affairs. Trusting that a procedure founded in these motives will meet their approbation, I beg leave, through you, sir, to communicate the enclosed Message, with the documents accompanying it, to the honorable the Senate, and pray you to accept, for yourself and them, the homage of my high respect and consideration.

TH. JEFFERSON.

¹ Richardson, *Messages and Papers of the Presidents*, I, 325.

CHAPTER XVIII

THE SENATE AS AN EXECUTIVE COUNCIL

THAT Washington expected the Senate to act as a sort of executive council admits of little doubt. The expectation was natural. The Convention of 1787 had expressly rejected a proposition to establish such a council and had associated the Senate with the President in important executive matters. Moreover, the membership was not at first too large to permit of its acting in a confidential, advisory capacity. But almost at once, if we may trust Maclay's *Journal*, the Senate exhibited an independence and aloofness which in the end prevented the establishment of intimate relations.

51. *Considerations on the Time, Place, and Manner of Consultations.*¹

The President has the power, by and with the advice and consent of the Senate, to make treaties and to appoint officers.

The Senate, when this power is exercised, is evidently a council only to the President, however its concurrence may be to his acts. It seems incident to this relation between them, that not only the *time*, but the *place* and *manner* of consultation, should be with the President. It is probable, that the place may vary. The indisposition or inclination of the President may require, that the Senate should be summoned to the President's house. Whenever the government shall have buildings of its own, an executive chamber will no doubt be provided, where the Senate will generally attend the President. It is not impossible, that the place may be made to depend in some degree on the nature of the business. In the appointment to offices, the agency of the Senate is purely executive, and they may be summoned to the President. In treaties, the agency is perhaps as much of a legislative nature, and the business may possibly be referred to their deliberations in their legislative chamber. The occasion for this distinction will be lessened if not destroyed, when a chamber shall be appropriated for the joint business of the President and the Senate.

¹ August 8, 1789. *Writings of George Washington* (Ford ed.), XI, 418-19.

The *manner* of consultation may also vary. The indisposition of the President may supersede the mere question of conveniency. The inclination or ideas of different Presidents may be different. The opinions, both of President and Senators, as to the proper manner, may be changed by experience. In some kinds of business it may be found best for the President to make his propositions orally and in person, in others by a written message. On some occasions it may be most convenient, that the President should attend the deliberations and decisions on his propositions; on others that he should not; or that he should not attend the whole of the time. In other cases, again, as in treaties of a complicated nature, it may happen, that he will send his propositions in writing, and consult the Senate in person after time shall have been allowed for consideration. Many other varieties may be suggested as to the *mode* by practice.

If these remarks be just, it would seem not amiss, that the Senate should accommodate their rules to the uncertainty of the particular mode and place, that may be preferred, providing for the reception of either oral or written propositions, and for giving their consent and advice in either the *presence* or *absence* of the President, leaving him free to use the mode and place, that may be found most eligible and accordant with other business, which may be before him at the time.

52. *How the President shall be received in the Senate.*¹

“*Resolved*, That when nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate shall direct otherwise, for taking them into consideration; that when the President of the United States shall meet the Senate in the Senate-chamber, the President of the Senate shall have a chair on the floor, be considered as at the head of the Senate, and his chair shall be assigned to the President of the United States; that, when the Senate shall be convened by the President of the United States

¹ Resolution of the Senate, August 21, 1789. *Writings of Washington* (Ford ed.), XI, 419 n.

at any other place, the President of the Senate and Senators shall attend at the place appointed. The secretary of the Senate shall also attend to take the minutes of the Senate; that all questions shall be put by the President of the Senate, either in the presence or absence of the President of the United States, and the Senators shall signify their assent or dissent by answering *viva voce* Ay or No."

53. *President and Senate in Executive Session.*¹

August 22d, Saturday. — Senate met, and went on the Coasting bill. The door-keeper soon told us of the arrival of the President. The President was introduced and took our Vice-President's chair. He rose and told us bluntly that he had called on us for our advice and consent to some propositions respecting the treaty to be held with the Southern Indians. Said he had brought General Knox with him, who was well acquainted with the business. He then turned to General Knox, who was seated on the left of the chair. Gen. Knox handed him a paper, which he handed to the President of the Senate, who was seated on a chair on the floor to his right. Our Vice-President hurried over the paper. Carriages were driving past, and such a noise, I could tell it was something about *Indians*, but was not master of one sentence of it. Signs were made to the door-keeper to shut down the sashes. Seven heads, as we since have learned, were stated at the end of the paper, which the Senate were to give their advice and consent to. They were so framed that this could be done by aye or no.

The President told us that a paper from an agent of the Cherokees was given to him just as he was coming to the Hall. He motioned to Gen. Knox for it, and handed it to the President of the Senate. It was read. It complained hard of the unjust treatment of the people of North Carolina, &c., their violation of treaties, &c. Our Vice-President now read off the first article, to which our advice and consent was requested. It referred back principally to some statements in the body of the writing which had been read.

¹ Maclay, *Journal of William Maclay*, 128-33 *passim*.

Mr. Morris rose. Said the noise of carriages had been so great that he really could not say that he had heard the body of the paper which had been read, and prayed it might be read again. It was so.

It was no sooner read, than our Vice-President immediately read the first head over again, and put the question, Do you advise and consent, &c.? There was a dead pause. Mr. Morris whispered me, "We will see who will venture to break silence first."

Our President was proceeding: "As many as —"

I rose reluctantly, indeed, and from the length of the pause, the hint given by Mr. Morris, and the proceeding of our Vice-President, it appeared to me that if I did not, no other one would, and we should have these advices and consents ravished, in a degree, from us.

Mr. President: The paper which you have now read to us appears to have for its basis sundry treaties and public transactions between the Southern Indians and the United States and the States of Georgia, North Carolina, and South Carolina. The business is new to the Senate. It is of importance. It is our duty to inform ourselves, as well as possible, on the subject. I therefore call for the reading of the treaties and other documents alluded to in the paper before us.

I cast an eye at the President of the United States. I saw he wore an aspect of stern displeasure. General Knox turned up some of the acts of Congress, and the protests of one Blount, agent for North Carolina. Mr. Lee rose and named a particular treaty, which he wished read. The business labored with the Senate. There appeared an evident reluctance to proceed. The first article was about the Cherokees. It was hinted that the person just come from there might have more information. The President of the United States rose; said he had no objection to that article being postponed, and in the meantime he would see the messenger.

The second article, which was about the Chickasaws and Choctaws, was likewise postponed. The third article more immediately concerned Georgia and the Creeks. Mr. Gunn,

from Georgia, moved that this be postponed till Monday. He was seconded by Mr. Few. General Knox was asked when General Lincoln would be here on his way to Georgia. He answered *not until Saturday next*. The whole House seemed against Gunn and Few. I rose, and said; When I considered the newness and importance of the subject, that one article had already been postponed; that General Lincoln, the first named of the commissioners, would not be here for a week; the deep interest Georgia had in this affair, — I could not think it improper that the Senators from that State should be indulged in a postponement until Monday; and more especially as I had not heard any inconvenience pointed out that could possibly flow from it.

The question was put, and actually carried; but Ellsworth immediately began a long discourse on the merits of the business. He was answered by Lee, who appealed to the Constitution with regard to the power of making war. Butler and Izard answered, and Mr. Morris at last informed the disputants that they were debating on a subject that was actually postponed. Mr. Adams denied, in the face of the House, that it had been postponed. This very trick has been played by him and his New England men more than once. The question was, however, put a second time, and carried.

I had, at an early stage of the business, whispered Mr. Morris that I thought the best way to conduct the business was to have all the papers committed. My reasons were that I saw no chance of a fair investigation of subjects while the President of the United States sat there, with his Secretary of War to support his opinions, and overawe the timid and neutral part of the Senate. Mr. Morris hastily rose, and moved that the papers communicated to the Senate by the President of the United States should be referred to a committee of five, to report as soon as might be on them. He was seconded by Mr. Gunn. Several members grumbled some objections. Mr. Butler rose; made a lengthy speech against commitment; said we were acting as a council. No council ever committed anything. Committees were an improper mode of doing business;

it threw business out of the hands of the many into the hands of the few, &c.

I rose, and supported the mode of doing business by committees; that committees were used in all public deliberative bodies, &c. I thought I did the subject justice, but concluded the commitment cannot be attended with any possible inconvenience. Some articles are already postponed until Monday. Whoever the committee are, if committed, they must make their report on Monday morning. I spoke through the whole in a low tone of voice. Peevishness itself, I think, could not have taken offense at anything I said.

As I sat down, the President of the United States started up in a violent fret. "*This defeats every purpose of my coming here,*" were the first words that he said. He then went on that he had brought his Secretary at War with him to give every necessary information; that the Secretary knew all about the business, and yet he was delayed, and could not go on with the matter. He cooled, however, by degrees. Said he had no objection to putting off this matter until Monday, but declared he did not understand the matter of commitment. He might be delayed; he could not tell how long.

He rose a second time, and said he had no objection to postponement until Monday at ten o'clock. By the looks of the Senate, this seemed agreed to. A pause for sometime ensued. We waited for him to withdraw. He did so, with a discontented air. Had it been any other than the man who I wish to regard as the first character in the world, I would have said, with sullen dignity.

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August 24th, Monday. — The Senate met. The President of the United States soon took his seat, and the business began. The President wore a different aspect from what he did Saturday. He was placid and serene, and manifested a spirit of accommodation; declared his consent that his questions should be amended. A tedious debate took place on the third article. I was called on by Mr. Lee, of Virginia, to state something respecting the treaty held by Pennsylvania. This brought me

up. I did not speak long, but endeavored to be as pointed as possible. The third article consisted of two questions. The first I was for, I disliked the second, but both were carried. The fourth article consisted of sundry questions. I moved pointedly for a division. Got it. Voted for the first, and opposed the second part. A long debate ensued, which was likely to end only in words. I moved to have the words "in failure thereof by the United States," struck out, and although Ellsworth, Wyngate, and Dalton had spoke on the same side with me, yet I was not seconded. My colleague had in private declared himself of my opinion also. It was an engagement that the United States would pay the stipulated purchase money for Georgia, in case Georgia did not. The arguments I used on this subject were so plain, I need not set them down. Yet a shamefacedness, or I know not what, flowing from the presence of the President, kept everybody silent.

The next clause was for a free port on the Altamaha or St. Mary's river. This produced some debate, and the President proposed "secure" port in place of "free" port. Agreed to. Now followed something of giving the Indians commissions, on their taking the oaths to Government. It was a silly affair, but it was carried without any debate. Now followed a clause, whether the cession of lands should be made an ultimatum with the Creeks. There was an alternative in case this should be negatived; but, strange to tell, the Senate negatived both, when it was plain one only should have been so. A boundary was named by a following clause which the commissioners were to adhere to. Money and honorary commissions to be given to the Indians. The old treaty with the Creeks, Choctaws, and Chickasaws, made the basis of the future treaty, though none of them were read to us, nor a single principle of them explained, (but it was late.) The twenty thousand dollars applied to this treaty, if necessary. This closed the business. The President of the United States withdrew, and the Senate adjourned.

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Just as the Senate had fairly entered on business, I was

called out by the door-keeper to speak to Col. Humphreys. It was to invite me to dinner with the President, on Thursday next, at four o'clock. I really was surprised at the invitation. It will be my duty to go; however, I will make no inferences whatever. I am convinced all the dinners he can now give, or ever could, will make no difference in my conduct. Perhaps he knew not of my being in town. Perhaps he has changed his mind of me. I was long enough in town, however, before my going home. It is a thing, of course, and of no consequence; nor shall it have any with me.

CHAPTER XIX

THE APPOINTING AND REMOVING POWER OF THE PRESIDENT

THE following extracts are from a debate in the House of Representatives, during the first session of Congress, on the bill to establish a department of foreign affairs, the head of which was to be appointed by the President "by and with the advice and consent of the Senate, and to be removable by the President." Both the constitutionality and the expediency of vesting the power of removal in the President alone were questioned. The debate was occasioned by a motion to strike out the clause "to be removable by the President." In the end a majority concurred in conceding the power to the President alone, but hesitated to appear to grant the power in a legislative act. The objectionable clause was stricken out, after an amendment had been adopted which stated that "whenever said principal officer shall be removed by the President," the chief clerk should perform his duties. The various arguments used by his opponents are summarized by Madison; the views of White were held by a considerable minority.

54. *Debate on the Establishment of a Secretaryship of Foreign Affairs.*¹

Mr. White. — The constitution gives the President the power of nominating, and, by and with the advice and consent of the Senate, appointing to office. As I conceive the power of appointing and dismissing to be united in their natures, and a principle that never was called in question in any Government, I am averse to that part of the clause which subjects the Secretary of Foreign Affairs to be removed at the will of the President. In the constitution, special provision is made for the removal of the judges; that I acknowledge to be a deviation from my principle; but as it is a constitutional provision, it is to be admitted. In all cases not otherwise provided for in the constitution, I take it, that the principle I have laid down is the governing one. Now the constitution has associated the

¹ House of Representatives, June 16-17, 1789. *Annals of Congress*, 1 Cong., 1 Sess., 473-521 *passim*.

Senate with the President, in appointing the heads of departments. The Secretary of Foreign Affairs is the head of a department; for the words of the law declare, that there shall be a department established, at the head of which shall be an officer to be so denominated. If, then, the Senate are associated with the President in the appointment, they ought also to be associated in the dismissal from office. . . .

I differ also with my colleague in the principle that he has laid down, that this is in its nature an executive power. The constitution supposes power incident to Government, and arranges it into distinct branches, with or without checks; but it enumerates under each department the powers it may exercise. The Legislature may exert its authority in passing laws relating to any of its particular powers. The executive power is vested in the President; but the executive powers so vested, are those enumerated in the constitution. He may nominate, and, by and with the advice and consent of the Senate, appoint all officers, because the constitution gives this power, and not because the power is in its nature a power incident to his department. My ideas of the legislative and executive powers are precisely the same. The Legislature may do certain acts because the constitution says they shall have power to do them, and the Executive Magistrate is authorized to exercise powers because they are vested in him by the same instrument. It has given him the power of appointment under certain qualifications; the power of removal is incident to the power of appointment, and both equally dependent upon the arrangement made in the constitution; consequently, a dismissal from office must be brought about by the same modification as the appointment.

Mr. Madison. — I feel the importance of the question, and know that our decision will involve the decision of all similar cases. The decision that is at this time made, will become the permanent exposition of the constitution; and on a permanent exposition of the constitution will depend the genius and character of the whole Government. . . . Another doctrine, which has found very respectable friends, has been particularly advocated by the gentleman from South Carolina, (Mr. Smith).

It is this: when an officer is appointed by the President and Senate, he can only be displaced for malfeasance in his office by impeachment. I think this would give a stability to the executive department, so far as it may be described by the heads of departments, which is more incompatible with the genius of republican Governments in general, and this constitution in particular, than any doctrine which has yet been proposed. The danger to liberty, the danger of mal-administration, has not yet been found to lie so much in the facility of introducing improper persons into office, as in the difficulty of displacing those who are unworthy of the public trust. If it is said, that an officer once appointed shall not be displaced without the formality required by impeachment, I shall be glad to know what security we have for the faithful administration of the Government? Every individual, in the long chain which extends from the highest to the lowest link of the Executive Magistracy, would find a security in his situation which would relax his fidelity and promptitude in the discharge of his duty.

The doctrine, however, which seems to stand most in opposition to the principles I contend for, is, that the power to annul an appointment is, in the nature of things, incidental to the power which makes the appointment. I agree that if nothing more was said in the constitution than that the President, by and with the advice and consent of the Senate, should appoint to office, there would be great force in saying that the power of removal resulted by a natural implication from the power of appointing. But there is another part of the constitution, no less explicit than the one on which the gentleman's doctrine is founded; it is that part which declares that the executive power shall be vested in a President of the United States. The association of the Senate with the President in exercising that particular function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly. But there is another part of the constitution which inclines, in my judgment, to favor the construction I put upon it; the President is required to take care that the laws be faithfully

executed. If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end. Now, if the officer when once appointed is not to depend upon the President for his official existence, but upon a distinct body, (for where there are two negatives required, either can prevent the removal,) I confess I do not see how the President can take care that the laws be faithfully executed. It is true, by a circuitous operation, he may obtain an impeachment, and even without this it is possible he may obtain the concurrence of the Senate for the purpose of displacing an officer; but would this give that species of control to the Executive Magistrate which seems to be required by the constitution? I own, if my opinion was not contrary to that entertained by what I suppose to be the minority on this question, I should be doubtful of being mistaken, when I discovered how inconsistent that construction would make the constitution with itself. I can hardly bring myself to imagine the wisdom of the convention who framed the constitution contemplated such incongruity.

There is another maxim which ought to direct us in expounding the constitution, and is of great importance. It is laid down, in most of the constitutions or bills of rights in the republics of America; it is to be found in the political writings of the most celebrated civilians, and is every where held as essential to the preservation of liberty, that the three great departments of Government be kept separate and distinct; and if in any case they are blended, it is in order to admit a partial qualification, in order more effectually to guard against an entire consolidation. I think, therefore, when we review the several parts of this constitution, when it says that the legislative powers shall be vested in a Congress of the United States under certain exceptions, and the executive power vested in the President with certain exceptions, we must suppose they were intended to be kept separate in all cases in which they are not blended, and ought, consequently, to expound the constitution so as to blend them as little as possible.

Every thing relative to the merits of the question as distinguished from a constitutional question, seems to turn on the danger of such a power vested in the President alone. But when I consider the checks under which he lies in the exercise of this power, I own to you I feel no apprehensions but what arise from the dangers incidental to the power itself; for dangers will be incidental to it, vest it where you please. I will not reiterate what was said before with respect to the mode of election, and the extreme improbability that any citizen will be selected from the mass of citizens who is not highly distinguished by his abilities and worth; in this alone we have no small security for the faithful exercise of this power. But, throwing that out of the question, let us consider the restraints he will feel after he is placed in that elevated station. It is to be remarked, that the power in this case will not consist so much in continuing a bad man in office, as in the danger of displacing a good one. Perhaps the great danger, as has been observed, of abuse in the executive power, lies in the improper continuance of bad men in office. But the power we contend for will not enable him to do this; for if an unworthy man be continued in office by an unworthy President, the House of Representatives can at any time impeach him, and the Senate can remove him, whether the President chooses or not. The danger then consists merely in this: the President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power, and the restraints that operate to prevent it? In the first place, he will be impeachable by this House, before the Senate, for such an act of mal-administration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust. But what can be his motives for displacing a worthy man? It must be that he may fill the place with an unworthy creature of his own. Can he accomplish this end? No; he can place no man in the vacancy whom the Senate shall not approve; and if he could fill the vacancy with the man he might choose, I am sure he would have little inducement to make an

improper removal. Let us consider the consequences. The injured man will be supported by the popular opinion; the community will take side with him against the President; it will facilitate those combinations, and give success to those exertions which will be pursued to prevent his re-election. To displace a man of high merit, and who from his station may be supposed a man of extensive influence, are considerations which will excite serious reflections beforehand in the mind of any man who may fill the Presidential chair. The friends of those individuals and the public sympathy will be against him. If this should not produce his impeachment before the Senate, it will amount to an impeachment before the community, who will have the power of punishment, by refusing to re-elect him. But suppose this persecuted individual cannot obtain revenge in this mode; there are other modes in which he could make the situation of the President very inconvenient, if you suppose him resolutely bent on executing the dictates of resentment. If he had not influence enough to direct the vengeance of the whole community, he may probably be able to obtain an appointment in one or the other branch of the Legislature; and being a man of weight, talents, and influence, in either case he may prove to the President troublesome indeed. We have seen examples in the history of other nations, which justifies the remark I now have made. Though the prerogatives of the British King are great as his rank, and it is unquestionably known that he has a positive influence over both branches of the legislative body, yet there have been examples in which the appointment and removal of ministers have been found to be dictated by one or other of those branches. Now if this be the case with an hereditary Monarch, possessed of those high prerogatives and furnished with so many means of influence; can we suppose a President, elected for four years only, dependent upon the popular voice, impeachable by the Legislature, little, if at all, distinguished for wealth, personal talents, or influence from the head of the department himself; I say, will he bid defiance to all these considerations, and wantonly dismiss a meritorious and virtuous officer? Such abuse of power

exceeds my conception. If any thing takes place in the ordinary course of business of this kind, my imagination cannot extend to it on any rational principle. But let us not consider the question on one side only; there are dangers to be contemplated on the other. Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community. The chain of dependence therefore terminates in the supreme body, namely, in the people, who will possess, besides, in aid of their original power, the decisive engine of impeachment. Take the other supposition; that the power should be vested in the Senate, on the principle that the power to displace is necessarily connected with the power to appoint. It is declared by the constitution, that we may by law vest the appointment of inferior officers in the heads of departments; the power of removal being incidental, as stated by some gentlemen. Where does this terminate? If you begin with the subordinate officers, they are dependent on their superior, he on the next superior, and he on — whom? On the Senate, a permanent body, a body, by its particular mode of election, in reality existing forever; a body possessing that proportion of aristocratic power which the constitution no doubt thought wise to be established in the system, but which some have strongly excepted against. And let me ask gentlemen, is there equal security in this case as in the other? Shall we trust the Senate, responsible to individual Legislatures, rather than the person who is responsible to the whole community? It is true, the Senate do not hold their offices for life, like aristocracies recorded in the historic page; yet the fact is, they will not possess that responsibility for the exercise of Executive powers which would render it safe for us to vest

such powers in them. But what an aspect will this give to the Executive? Instead of keeping the departments of Government distinct, you make an Executive out of one branch of the Legislature; you make the Executive a two-headed monster, to use the expression of the gentleman from New Hampshire, (Mr. Livermore,) you destroy the great principle of responsibility, and perhaps have the creature divided in its will, defeating the very purposes for which a unity in the Executive was instituted. These objections do not lie against such an arrangement as the bill establishes. I conceive that the President is sufficiently accountable to the community; and if this power is vested in him, it will be vested where its nature requires it should be vested; if any thing in its nature is executive, it must be that power which is employed in superintending and seeing that the laws are faithfully executed. The laws cannot be executed but by officers appointed for that purpose; therefore, those who are over such officers naturally possess the executive power. If any other doctrine be admitted, what is the consequence? You may set the Senate at the head of the executive department, or you may require that the officers hold their places during the pleasure of this branch of the Legislature, if you cannot go so far as to say we shall appoint them; and by this means, you link together two branches of the Government which the preservation of liberty requires to be constantly separated.

Another species of argument has been urged against this clause. It is said, that it is improper, or at least unnecessary, to come to any decision on this subject. It has been said by one gentleman, that it would be officious in this branch of the Legislature to expound the constitution, so far as it relates to the division of power between the President and Senate; it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty, so far as it depends upon us, to take care that the powers of the constitution be preserved entire to every department of Government; the breach of the constitution in one point, will facilitate the breach in another;

a breach in this point may destroy that equilibrium by which the House retains its consequence and share of power; therefore we are not chargeable with an officious interference. Besides, the bill, before it can have effect, must be submitted to both those branches who are particularly interested in it; the Senate may negative, or the President may object, if he thinks it unconstitutional.

But the great objection drawn from the source to which the last arguments would lead us is, that the Legislature itself has no right to expound the constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the Judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of Government, that the exposition of the laws and constitution devolves upon the Judiciary. But, I beg to know, upon what principle it can be contended, that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments? The constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.

Perhaps this is an omitted case. There is not one Government on the face of the earth, so far as I recollect, there is not one in the United States, in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the Government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the constitution, or one dictated by the necessity of the case. It is therefore a fair question, whether this great point may not as well be decided, at least by the whole Legislature as by a part, by us as well as by the

Executive or Judiciary? As I think it will be equally constitutional, I cannot imagine it will be less safe, that the exposition should issue from the legislative authority than any other; and the more so, because it involves in the decision the opinions of both those departments, whose powers are supposed to be affected by it. Besides, I do not see in what way this question could come before the judges, to obtain a fair and solemn decision; but even if it were the case that it could, I should suppose, at least while the Government is not led by passion, disturbed by faction, or deceived by any discolored medium of sight, but while there is a desire in all to see and be guided by the benignant ray of truth, that the decision may be made with the most advantage by the Legislature itself.

CHAPTER XX

CONGRESS AND THE TREASURY DEPARTMENT

"NATIONS in general," wrote Hamilton in the *Federalist*, "even under governments of the most popular kind, usually commit the administration of their finances to single men or to boards composed of a few individuals, who digest and prepare in the first instance the plans of taxation which are afterwards passed into laws." The bill to establish a treasury department was drawn in accordance with these ideas. That Hamilton would be the first incumbent of the office was generally taken for granted. His well-known partiality for British institutions may have caused the misgivings of those who opposed the bill in its first form. They were disinclined to make Alexander Hamilton an American chancellor of the exchequer. A comparison of the act establishing the Treasury Department with the acts creating other departments indicates that a direct responsibility of the Secretary to Congress was expected. The want of an explicit declaration of responsibility caused succeeding incumbents of the office much embarrassment, until President Jackson established the principle of presidential direction and control.

55. *Debate on the Establishment of a Secretaryship of Treasury.*¹

Mr. Page objected to the words making it the duty of the Secretary to "digest and report plans for the improvement and management of the revenue, and the support of the public credit;" observing that it might be well enough to enjoin upon him the duty of making out and preparing estimates; but to go any further would be dangerous innovation upon the constitutional privilege of this House; it would create an undue influence within these walls, because members might be led, by the deference commonly paid to men of abilities, who give an opinion in a case they have thoroughly studied, to support the minister's plan, even against their own judgment. Nor would the mischief stop here; it would establish a precedent which might be extended, until we admitted all the ministers of the Government on the floor, to explain and support the

¹ House of Representatives, June 25, 1789. *Annals of Congress*, 1 Cong., 1 Sess., 616-31 *passim*.

plans they have digested and reported: thus laying a foundation for an aristocracy or a detestable monarchy.

Mr. Tucker. — The objection made by the gentleman near me is, undoubtedly, well founded. I think it proper to strike out all the words alluded to, because the following are sufficient to answer every valuable purpose, namely, "to prepare and report estimates of the public revenue and public expenditures." If we authorize him to prepare and report plans, it will create an interference of the executive with the legislative powers; it will abridge the particular privilege of this House; for the constitution expressly declares, that all bills for raising revenue shall originate in the House of Representatives. How can the business originate in this House, if we have it reported to us by the Minister of Finance? All the information that can be required, may be called for, without adopting a clause that may undermine the authority of this House, and the security of the people. The constitution has pointed out the proper method of communication between the executive and legislative departments; it is made the duty of the President to give, from time to time, information to Congress of the state of the Union, and to recommend to their consideration such measures as he shall judge necessary and expedient. If revenue plans are to be prepared and reported to Congress, here is the proper person to do it; he is responsible to the people for what he recommends, and will be more cautious than any other person to whom a less degree of responsibility is attached. Under this clause, you give the Secretary of the Treasury a right to obtrude upon you plans, not only undigested, but even improper to be taken up.

I hope the House is not already weary of executing and sustaining the powers vested in them by the constitution; and yet it would argue that we thought ourselves less adequate to determine than any individual what burthens our constituents are equal to bear. This is not answering the high expectations that were formed of our exertions for the general good, or of our vigilance in guarding our own and the people's rights. In short, Mr. Chairman, I can never agree to have money bills

originated and forced upon this House by a man destitute of legislative authority; while the constitution gives such power solely to the House of Representatives; for this reason, I cheerfully second the motion for striking out the words.

Mr. Page. — I can never consent to establish, by law, this interference of an executive officer in business of legislation; it may be well enough in an absolute monarchy, for a minister to come to a Parliament with his plans in his hands, and order them to be enregistered or enacted; but this practice does not obtain even in a limited monarchy like Britain. The minister there, who introduces his plans, must be a member of the House of Commons. The man would be treated with indignation, who should attempt in that country to bring his schemes before Parliament in any other way. Now, why we, in the free republic of the United States, should introduce such a novelty in legislation, I am at a loss to conceive. . . .

Mr. Ames. — It has been complained of as a novelty; but, let me ask gentlemen, if it is not to an institution of a similar kind that the management of the finances of Britain is the envy of the world? It is true, the Chancellor of the Exchequer is a member of the House that has the sole right of originating money bills; but is that a reason why we should not have the information which can be obtained from our officer, who possesses the means of acquiring equally important and useful knowledge? The nation, as well as the Parliament of Britain, holds a check over the Chancellor: if his budget contains false calculations, they are corrected; if he attempts impositions, or even unpopular measures, his administration becomes odious, and he is removed. Have we more reason to fear than they? Have we less responsibility or security in our arrangement of the Treasury department? If we have, let us improve it, but not abridge it of its safest and most useful power. I hope the committee will refuse their approbation of the present motion.

Mr. Sedgwick. — If the principle prevails for curtailing this part of the Secretary's duty, we shall lose the advantages which the proposed system was intended to acquire. The im-

provement and management of the revenue is a subject that must be investigated by a man of abilities and indefatigable industry, if we mean to have our business advantageously done. If honorable gentlemen will for a moment consider the peculiar circumstances of this country, the means of information attainable by the individual members of this House, and compare them with the object they have to pursue, they will plainly perceive the necessity of calling to their aid the advantages resulting from an establishment like the one contemplated in the bill; if they weigh these circumstances carefully, their objections, I trust, will vanish. Coming, Mr. Chairman, as we do, from different parts of the Union, from States where the objects of revenue are different, where the circumstances and views of the people are different, and in a great degree local, it appears to me that no one member can be so fortunate as to possess the extensive knowledge attainable by this officer. Another circumstance induces me to draw the same conclusion. We shall find systems adopted to defeat the collection of the revenue, but it will be impossible for any of us to become so well acquainted with these machinations as to defeat their object; but from the advantageous position we give the Secretary of the Treasury, and the multifarious objects of his attention, he may watch over and detect their plans; he will have a better capacity to propose a remedy than any member of the Legislature.

I do not apprehend any undue influence operating on the members of this House, because I am persuaded there will ever prevail an independent and indignant spirit within the walls of Congress, hostile to every venal attempt. Nor do I believe it possible to color, with a semblance of justice, either false or base measures against the public welfare; the wisdom of this House can never be thought so meanly of. I trust a majority will always be found wise and virtuous enough to resist being made the tools of a corrupt administration. I, therefore, with confidence, approve the object of the clause.

I will mention one other circumstance, of no inconsiderable force, in favor of the bill. Coming, as I said we do, from dis-

tricts with different ideas, perhaps different objects to pursue, much time will necessarily be consumed before a current is found in which the mind of the majority will run; and even then, gentlemen will not be certain they have procured all the information that could be obtained. It appears, therefore, to me, from the reason and nature of things, to be our duty, as wise legislators, to form such a reservoir for information as will supply us with what is necessary and useful at all times.

Mr. Boudinot. — A proper jealousy for the liberty of the people is commendable in those who are appointed and sworn to be its faithful guardians; but when this spirit is carried so far as to lose sight of its object, and instead of leading to avoid, urges on to the precipice of ruin, we ought to be careful how we receive its impressions. So far is the present measure from being injurious to liberty, that it is consistent with the true interest and prosperity of the community. Are gentlemen apprehensive we shall be led by this officer to adopt plans we should otherwise reject? For my part, I have a better opinion of the penetration of the representation of the people than to dread any such visionary phantom.

Let us consider whether this power is essentially necessary to the Government. I take it to be conceded by the gentlemen, that it is absolutely so. They say they are willing to receive the information because it may be serviceable, but do not choose to have it communicated in this way. If the Secretary of the Treasury is the proper person to give the information, I can see no other mode of obtaining it that would be so useful. Do gentlemen mean that he shall give it piecemeal, by way of question and answer? This will tend more to mislead than to inform us. If we would judge upon any subject, it would be better to have it in one clear and complete view, than to inspect it by detachments; we should lose the great whole in the minutiae, and, instead of a system, should present our constituents with a structure composed of discordant parts, counteracting and defeating the operation of each other's properties.

Make your officer responsible, and the presumption is, that

plans and information are properly digested; but if he can secrete himself behind the curtain, he might create a noxious influence, and not be answerable for the information he gives. I conceive this great principle of responsibility to be essentially necessary to secure the public welfare: make it his duty to study the subject well, and put the means in his power; we can then draw from him all the information he has acquired, and apply it to its proper use. Without such an officer, our plans will be ineffectual and inconsistent. I have seen too much the want of a like officer in the State Legislatures, not to make me very desirous of adopting the present plan. It has been said, that the members coming from the different parts of the Union are the most proper persons to give information. I deny the principle. There are no persons in the Government to whom we could look with less propriety for information on this subject than to the members of this House. We are called from the pursuit of our different occupations, and come without the least preparation to bring forward a subject that requires a great degree of assiduous application to understand; add to this the locality of our ideas, which is too commonly the case, and we shall appear not very fit to answer the end of our appointment. Witness the difficulty and embarrassments with which we have hitherto been surrounded. If we had the subject digested and prepared, we should determine with ease on its fitness, its combination, and its principles, and might supply omissions or defects without hazard; and this in half the time we could frame a system, if left to reduce the chaos into order.

Mr. Gerry expressed himself in favor of the object of the clause; that was, to get all the information possible for the purpose of improving the revenue, because he thought this information would be much required, if he judged from the load of public debt, and the present inability of the people to contribute largely toward its reduction.

He could not help observing, however, the great degree of importance they were giving this, and the other executive officers. If the doctrine of having prime and great ministers of state was once well established, he did not doubt but we should

soon see them distinguished by a green or red ribbon, or other insignia of court favor and patronage. He wished gentlemen were aware of what consequences these things lead to, that they might exert a greater degree of caution.

The practice of Parliament in Britain is first to determine the sum they will grant, and then refer the subject to a Committee of Ways and Means; this might be a proper mode to be pursued in this House.

Do gentlemen, said he, consider the importance of the power they give the officer by the clause? Is it not part of our legislative authority? And does not the constitution expressly declare that the House solely shall exercise the power of originating revenue bills? Now, what is meant by reporting plans? It surely includes the idea of originating money bills, that is, a bill for improving the revenue, or, in other words, for bringing revenue into the treasury. For if he is to report plans, they ought to be reported in a proper form, and complete. This is giving an indirect voice in legislative business to an executive officer. . . .

Mr. Page's motion for striking out the clause being put and negatived:

The question on Mr. Fitzsimons's motion to amend the bill, by striking out the word report, and inserting prepare, was taken and carried by a great majority.

56. *Power of the House over Heads of Departments.*¹

Mar. 31. A meeting at the P[resident]'s, present Th: J[efferson], A. H[amilton], H. K[nox], & E. R[andolph]. The subject was the resoln of the H, of Repr. of Mar. 27. to appt a commee to inquire into the causes of the failure of the late expdn under Maj. Genl. St. Clair with power to call for such persons, papers & records as may be necessary to assist their inquiries. The commee had written to Knox for the original letters, instns, &c. The President he had called us to consult, merely because it was the first example, & he wished that so far as it shd become a precedent, it should be rightly conducted.

¹ Jefferson's *Anas. Writings of Thomas Jefferson* (Ford ed.), I, 189-90.

He neither acknowledged nor denied, nor even doubted the propriety of what the house were doing, for he had not thought upon it, nor was acquainted with subjects of this kind. He could readily conceive there might be papers of so secret a nature as that they ought not to be given up. — We were not prepared & wished time to think & enquire.

Apr. 2. Met again at P's on same subject. We had all considered and were of one mind 1. that the house was an inquest, & therefore might institute inquiries. 2. that they might call for papers generally. 3. that the Executive ought to communicate such papers as the public good would permit, & ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion. 4. that neither the commee nor House had the right to call on the head of a deptmt, who & whose papers were under the Presidt. alone, but that the commee shd instruct their chairman to move the house to address the President. . . . Hamilt. agrd with us in all these points except as to the power of the house to call on heads of departmts. He observed that as to his departmt the act constituting it had made it subject to Congress in some points, but he thot himself not so far subject as to be obliged to produce all papers they might call for. They might demand secrets of a very mischievous nature. Here I thot he began to fear they would go to examining how far their own members & other persons in the govmnt had been dabbling in stocks, banks &c., and that he probably would choose in this case to deny their power & in short he endeavd. to place himself subject to the house when the Executive should propose what he should not like, & subject to the Executive, when the house shd propose anything disagreeable. I observed here a difference between the Brit parl & our Congress, that the former was a legislature, an inquest, & a council for the king. The latter was by the constn a legislature & an inquest but not a council. Finally agreed to speak separation [*sic*] to the members of the commee & bring them by persuasion into the right channel. It was agreed in this case that there was not a paper which might not be properly produced, that copies only should

be sent, with an assurance that if they should desire it, a clerk should attend with the originals to be verified by themselves. . . .

57. *Reports of the Secretary of Treasury.*¹

. . . By the law constituting the Treasury Department, it is enacted that the Secretary shall lay before Congress or either House such reports, documents, &c., as he may be directed from time to time. Hence the invariable practice has been to call for financial information directly on the Treasury Department, except in the case of loans, where the authority had been given by the President; and for information respecting Army, Navy, or State Department, the application is always to the President, requesting him to direct, &c. The distinction, it is presumable, has been made in order to leave Congress a direct power, uncontrolled by the Executive, on financial documents and information as connected with money and revenue subjects. It would at present be much more convenient to follow a different course; if instead of six or seven reports called for by the standing orders of one or the other House, I could throw them all into one, to be made to you, it would unite the advantages of simplicity and perspicuity to that of connection with the reports made by the other Departments, as all might then be presented to Congress through you and by you; but I fear that it would be attacked as an attempt to dispense with the orders of the Houses or of Congress if the usual reports were not made in the usual manner to them; and if these are still made, it becomes useless for you to communicate duplicates. . . . *Quere*, whether this remarkable distinction, which will be found to pervade all the laws relative to the Treasury Department, was not introduced to that extent in order to give to Mr. Hamilton a department independent of every executive control? It may be remembered that he claimed under those laws the right of making reports and proposing reforms, &c., without being called on for the same by Congress. This was a

¹ Gallatin to Jefferson, November, 1801. Henry Adams, *Writings of Albert Gallatin*, I, 66-67.

Presidential power, for by the Constitution the President is to call on the Departments for information, and has alone the power of recommending. But in the present case, see the Act supplementary to the Act establishing the Treasury Department, passed in 1800.

CHAPTER XXI

THE WHISKEY INSURRECTION

THE extreme concern with which the administration viewed the resistance of western Pennsylvania to the excise is expressed without reserve in the letters which passed between the President and his Secretary of the Treasury. As administrative head of the revenue officers, Hamilton had information which led him to fear lest the local disorders might assume the proportions of a rebellion. In that event, he thought public opinion quite as likely to support the rebels as to rally to the aid of the Federal Government. The Federal Government, indeed, seemed to be on trial. The scrupulous care of the President to use the military only as an adjunct to the civil authorities, appears both in his proclamations and in the instructions conveyed by Hamilton to Governor Lee.

58. *Proclamation of August 7, 1794.*¹

Whereas combinations to defeat the execution of the laws laying duties upon spirits distilled within the United States and upon stills have from the time of the commencement of those laws existed in some of the western parts of Pennsylvania; and

Whereas the said combinations, proceeding in a manner subversive equally of the just authority of government and of the rights of individuals, have hitherto effected their dangerous and criminal purpose by the influence of certain irregular meetings whose proceedings have tended to encourage and uphold the spirit of opposition by misrepresentations of the laws calculated to render them odious; by endeavors to deter those who might be so disposed from accepting offices under them through fear of public resentment and of injury to person and property, and to compel those who had accepted such offices by actual violence to surrender or forbear the execution of them; by circulating vindictive menaces against all those who should otherwise, directly or indirectly, aid in the execution of the said laws, or who, yielding to the dictates of conscience

¹ Richardson, *Messages and Papers of the Presidents*, I, 158-60.

and to a sense of obligation, should themselves comply therewith; by actually injuring and destroying the property of persons who were understood to have so complied; by inflicting cruel and humiliating punishments upon private citizens for no other cause than that of appearing to be the friends of the laws; by intercepting the public officers on the highways, abusing, assaulting, and otherwise ill treating them; by going to their houses in the night, gaining admittance by force, taking away their papers, and committing other outrages, employing for these unwarrantable purposes the agency of armed banditti disguised in such manner as for the most part to escape discovery; and

Whereas the endeavors of the Legislature to obviate objections to the said laws by lowering the duties and by other alterations conducive to the convenience of those whom they immediately affect (though they have given satisfaction in other quarters), and the endeavors of the executive officers to conciliate a compliance with the laws by explanations, by forbearance, and even by particular accommodations founded on the suggestion of local considerations, have been disappointed of their effect by the machinations of persons whose industry to excite resistance has increased with every appearance of a disposition among the people to relax in their opposition and to acquiesce in the laws, insomuch that many persons in the said western parts of Pennsylvania have at length been hardy enough to perpetrate acts which I am advised amount to treason, being overt acts of levying war against the United States, the said persons having on the 16th and 17th July last past proceeded in arms (on the second day amounting to several hundreds) to the house of John Neville, inspector of the revenue for the fourth survey of the district of Pennsylvania; having repeatedly attacked the said house with the persons therein, wounding some of them; having seized David Lenox, marshal of the district of Pennsylvania, who previous thereto had been fired upon while in the execution of his duty by a party of armed men, detaining him for some time prisoner, till for the preservation of his life and the obtaining of his

liberty he found it necessary to enter into stipulations to forbear the execution of certain official duties touching processes issuing out of a court of the United States; and having finally obliged the said inspector of the said revenue and the said marshal from considerations of personal safety to fly from that part of the country, in order, by a circuitous route, to proceed to the seat of Government, avowing as the motives of these outrageous proceedings an intention to prevent by force of arms the execution of the said laws, to oblige the said inspector of the revenue to renounce his said office, to withstand by open violence the lawful authority of the Government of the United States, and to compel thereby an alteration in the measures of the Legislature and a repeal of the laws aforesaid; and

Whereas by a law of the United States entitled "An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," it is enacted "that whenever the laws of the United States shall be opposed or the execution thereof obstructed in any State by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by that act, the same being notified by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such State to suppress such combinations and to cause the laws to be duly executed. And if the militia of a State where such combinations may happen shall refuse or be insufficient to suppress the same, it shall be lawful for the President, if the Legislature of the United States shall not be in session, to call forth and employ such numbers of the militia of any other State or States most convenient thereto as may be necessary; and the use of the militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session: *Provided always*, That whenever it may be necessary in the judgment of the President to use the military force hereby directed to be called forth, the President shall forthwith, and previous thereto, by proclamation, command such insurgents to disperse and retire

peaceably to their respective abodes within a limited time," and

Whereas James Wilson, an associate justice, on the 4th instant, by writing under his hand, did from evidence which had been laid before him notify to me that "in the counties of Washington and Allegany, in Pennsylvania, laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshal of that district;" and

Whereas it is in my judgment necessary under the circumstances of the case to take measures for calling forth the militia in order to suppress the combinations aforesaid, and to cause the laws to be duly executed; and I have accordingly determined so to do, feeling the deepest regret for the occasion, but withal the most solemn conviction that the essential interests of the Union demand it, that the very existence of Government and the fundamental principles of social order are materially involved in the issue, and that the patriotism and firmness of all good citizens are seriously called upon, as occasions may require, to aid in the effectual suppression of so fatal a spirit:

Wherefore, and in pursuance of the proviso above recited, I, George Washington, President of the United States, do hereby command all persons being insurgents as aforesaid, and all others whom it may concern, on or before the 1st day of September next to disperse and retire peaceably to their respective abodes. And I do moreover warn all persons whomsoever against aiding, abetting, or comforting the perpetrators of the aforesaid treasonable acts, and do require all officers and other citizens, according to their respective duties and the laws of the land, to exert their utmost endeavors to prevent and suppress such dangerous proceedings. . . .

59. *Proclamation of September 25, 1794.*¹

Whereas from a hope that the combinations against the Constitution and laws of the United States in certain of the western

¹ Richardson, *Messages and Papers of the Presidents*, 1, 161-62.

counties of Pennsylvania would yield to time and reflection I thought it sufficient in the first instance rather to take measures for calling forth the militia than immediately to embody them, but the moment is now come when the overtures of forgiveness, with no other condition than a submission to law, have been only partially accepted; when every form of conciliation not inconsistent with the being of Government has been adopted without effect; when the well-disposed in those counties are unable by their influence and example to reclaim the wicked from their fury, and are compelled to associate in their own defense; when the proffered lenity has been perversely misinterpreted into an apprehension that the citizens will march with reluctance; when the opportunity of examining the serious consequences of a treasonable opposition has been employed in propagating principles of anarchy, endeavoring through emissaries to alienate the friends of order from its support, and inviting its enemies to perpetrate similar acts of insurrection; when it is manifest that violence would continue to be exercised upon every attempt to enforce the laws; when, therefore, Government is set at defiance, the contest being whether a small portion of the United States shall dictate to the whole Union, and, at the expense of those who desire peace, indulge a desperate ambition:

Now, therefore, I, George Washington, President of the United States, in obedience to that high and irresistible duty consigned to me by the Constitution "to take care that the laws be faithfully executed," deploring that the American name should be sullied by the outrages of citizens on their own Government, commiserating such as remain obstinate from delusion, but resolved, in perfect reliance on that gracious Providence which so signally displays its goodness towards this country, to reduce the refractory to a due subordination to the law, do hereby declare and make known that, with a satisfaction which can be equaled only by the merits of the militia summoned into service from the States of New Jersey, Pennsylvania, Maryland, and Virginia, I have received intelligence of their patriotic alacrity in obeying the call of the

present, though painful, yet commanding necessity; that a force which, according to every reasonable expectation, is adequate to the exigency is already in motion to the scene of disaffection; that those who have confided or shall confide in the protection of Government shall meet full succor under the standard and from the arms of the United States; that those who, having offended against the laws, have since entitled themselves to indemnity will be treated with the most liberal good faith if they shall not have forfeited their claim by any subsequent conduct, and that instructions are given accordingly.

And I do moreover exhort all individuals, officers, and bodies of men to contemplate with abhorrence the measures leading directly or indirectly to those crimes which produce this resort to military coercion; to check in their respective spheres the efforts of misguided or designing men to substitute their misrepresentation in the place of truth and their discontents in the place of stable government, and to call to mind that, as the people of the United States have been permitted, under the Divine favor, in perfect freedom, after solemn deliberation, and in an enlightened age, to elect their own government, so will their gratitude for this inestimable blessing be best distinguished by firm exertions to maintain the Constitution and the laws.

And, lastly, I again warn all persons whomsoever and wheresoever not to abet, aid, or comfort the insurgents aforesaid, as they will answer the contrary at their peril; and I do also require all officers and other citizens, according to their several duties, as far as may be in their power, to bring under the cognizance of the laws all offenders in the premises. . . .

60. *Instructions to Governor Lee.*¹

" Bedford, 20th October, 1794.

"Sir: — I have it in special instruction from the President of the United States, now at this place, to convey to you, on his behalf, the following instructions, for the general direction

¹ Brackenridge, *History of the Western Insurrection*, 283-85.

of your conduct, in command of the militia army, with which you are charged. . . .

“The objects of the military force are two-fold:

“1. To overcome any armed opposition which may exist.

“2. To countenance and support the civil officers in the means of executing the laws.

“With a view to the first of these two objects, you may proceed as speedily as may be with the army under your command, into the insurgent counties, to attack, and as far as shall be in your power, subdue all persons whom you may find in arms, in opposition to the laws above mentioned. You will march your army in two columns, from the places where they are now assembled, by the most convenient routes, having regard to the nature of the roads, the convenience of supply, and the facility of coöperation and union, and bearing in mind that you ought to act until the contrary shall be fully developed, on the general principle of having to contend with the whole force of the counties of Fayette, Westmoreland, Washington and Allegheny, and of that part of Bedford which lies westward of the town of Bedford; and that you are to put as little as possible to hazard. . . .

“When arrived within the insurgent country, if an armed opposition appear, it may be proper to publish a proclamation inviting all good citizens, friends to the constitution and laws, to join the standard of the United States. If no armed opposition exist, it may still be proper to publish a proclamation, exhorting to a peaceful and dutiful demeanor, and giving assurances of performing, with good faith and liberality, whatsoever may have been promised by the commissioners, to those who have complied with the conditions prescribed by them, and who have not forfeited their title by subsequent misdemeanor.

“Of these persons in arms, if any, whom you may make prisoners; leaders, including all persons in command, are to be delivered to the civil magistrates; the rest to be disarmed, admonished, and sent home, (except such as may have been particularly violent, and also influential,) causing their own

recognizances for their good behavior to be taken, in the cases which it may be deemed expedient.

"With a view to the second point, namely, the countenance and support of the civil officers in the means of executing their laws: you will make such dispensations as shall appear proper, to countenance and protect, and if necessary, and required by them, to support and aid the civil officers in the execution of their respective duties; for bringing offenders and delinquents to justice; for seizing the stills of delinquent distillers, as far as the same shall be deemed eligible by the supervisor of the revenue, or chief officers of inspection; and also for conveying to places of safe custody such persons as may be apprehended and not admitted to bail.

"The objects of judiciary process and other civil proceedings shall be:

"1. To bring offenders to justice.

"2. To enforce penalties on delinquent distillers by suit.

"3. To enforce the penalties of forfeiture on the same persons by the seizure of their stills and spirits.

"The better to effect these purposes, the Judge of the district, Richard Peters, Esq., and the Attorney of the district, William Rawl, Esq., accompany the army.

"You are aware that the Judge cannot be controlled in his functions. But I count on his disposition to coöperate in such a general plan, as shall appear to you consistent with the policy of the case. But your method of giving direction to proceedings, according to your general plan, will be by instructions to the district attorney.

"He ought particularly to be instructed (with due regard to time and circumstances,) 1st, To procure to be arrested all influential actors in riots and unlawful assemblies, relating to the insurrection and combination to resist the laws; or having for object to abet that insurrection and these combinations; and who shall not have complied with the terms offered by the commissioners, or manifested their repentance in some other way, which you may deem satisfactory. 2d. To cause process to issue, for enforcing penalties on delinquent distillers. 3d.

To cause offenders who may be arrested, to be conveyed to jails where there will be no danger of rescue — those for misdemeanors to the jails of York and Lancaster — those for capital offenses to the jail of Philadelphia, as more secure than the others. 4th. Prosecute indictable offenses in the court of the United States; those for penalties, or delinquents, under the laws before mentioned, in the courts of Pennsylvania.

“As a guide in the case, the District Attorney has with him a list of the persons who have availed themselves of the offers of the commissioners on the day appointed.

“The seizure of stills is of the province of the supervisor, and other officers of inspection. It is difficult to chalk out a precise line concerning it. There are opposite considerations which will require to be nicely balanced, and which must be judged of by those officers on the spot. It may be useful to confine the seizure of stills to the most leading and refractory distillers. It may be advisable to extend them far into the most refractory county. . . .

“You are to exert yourself by all possible means to preserve discipline amongst the troops, particularly a scrupulous regard to the rights of persons and property, and a respect for the authority of the civil magistrates, taking especial care to inculcate, and cause to be observed this principle — that the duties of the army are confined to attacking and subduing of armed opponents of the laws, and to the supporting and aiding of the civil officers in the execution of their functions.

“It has been settled that the Governor of Pennsylvania will be second, the Governor of New Jersey third in command; and that the troops of the several States in line, on the march, and upon detachment, are to be posted according to the rule which prevailed in the army during the late war, namely, in moving toward the seaboard, the most southern troops will take the right — in moving toward the north, the most northern troops will take the right. . . .

“With great respect, I have the honor to be, Sir,

“Your obedient servant,

“ALEXANDER HAMILTON.”

CHAPTER XXII

THE PART OF THE HOUSE IN TREATY-MAKING

UPON the ratification of the Jay Treaty by the Senate, the opposition in the House sought to compass its defeat by withholding the necessary legislation to carry it into effect. It was asserted that the House, while not a part of the treaty-making agency of the Government, might properly call upon the President for papers relative to a treaty, in order wisely to exercise its discretionary power of providing — or not providing — for the execution of the terms of a treaty. These contentions were ably presented by Gallatin. The supporters of the administration were sustained by Washington's vigorous message. The claims of the House were finally recorded in the Blount Resolutions, and have never been formally relinquished.

61. *Debate in the House of Representatives on the Jay Treaty.*¹

On the second of March, [1796,] Mr. Livingston, after stating that the late British Treaty must give rise in the House to some very important and constitutional questions, to throw light upon which every information would be required, laid the following resolution upon the table.

“Resolved, That the President of the United States be requested to lay before this House a copy of the instructions to the Minister of the United States, who negotiated the Treaty with the King of Great Britain, communicated by his Message of the first of March, together with the correspondence and other documents relative to the said Treaty.”

March 7. — Mr. Livingston said he wished to modify the resolution he had laid on the table, requesting the President to lay before the House sundry documents respecting the Treaty. It was calculated to meet the suggestions of gentlemen to whose opinions he paid the highest respect, and was founded in the reflection that the negotiations on the twelfth article were probably unfinished; and therefore, he said, a disclosure of papers relative to that or any other pending negotiation, might

¹ *Annals of Congress*, 4 Cong., 1 Sess., 426-772 *passim*.

embarrass the Executive. He wished, therefore, to add, at the end of his former motion, the following words: "Excepting such of said papers as any existing negotiation may render improper to be disclosed."

The motion of Mr. Livingston was then taken up. . . .

Mr. Gallatin conceived that, whether the House had a discretionary power with respect to Treaties, or whether they were absolutely bound by those instruments, and were obliged to pass laws to carry them fully into effect, still there was no impropriety in calling for the papers. Under the first view of the subject, if the House has a discretionary power, then no doubt could exist that the information called for is proper; and, under the second, if bound to pass laws, they must have a complete knowledge of the subject, to learn what laws ought to be passed. This latter view of the subject, even, must introduce a discussion of the Treaty, to know whether any law ought to be repealed, or to see what laws ought to be passed. If any article in the instrument should be found of doubtful import, the House would most naturally search for an explanation, in the documents which related to the steps which led to the Treaty. If one article of the Treaty only be doubtful, the House would not know how to legislate without the doubt being removed, and its explanation could certainly be found nowhere with so much propriety as in the correspondence between the negotiating parties.

Gentlemen had gone into an examination of an important constitutional question upon this motion. He hoped this would have been avoided in the present stage of the business; but as they had come forward on that ground, he had no objection to follow them in it, *and to rest the decision of the constitutional powers of Congress on the fate of the present question.* He would, therefore, state his opinion, that the House had a *right* to ask for the papers proposed to be called for, because their co-operation and sanction was necessary to carry the Treaty into full effect, to render it a binding instrument, and to make it, properly speaking, a law of the land; because they had a full dis-

cretion either to give or to refuse that co-operation; because they must be guided, in the exercise of that discretion, by the merits and expediency of the Treaty itself, and therefore had a *right* to ask for every information which could assist them in deciding that question.

One argument repeatedly used by every gentleman opposed to the present motion was, "That the Treaty was unconstitutional or not; if not, the House had no agency in the business, but must carry it into full effect; and if unconstitutional, the question could only be decided from the face of the instrument, and no papers could throw light upon the question." He wished gentlemen had defined what they understood by a constitutional Treaty; for, if the scope of their arguments was referred to, it would not be found possible to make an unconstitutional treaty. He would say what he conceived constituted the unconstitutionality of a treaty. A treaty is unconstitutional if it provides for doing such things, the doing of which is forbidden by the Constitution; but if a treaty embraces objects within the sphere of the general powers delegated to the Federal Government, but which have been exclusively and specially granted to a particular branch of Government, say to the Legislative department, such a Treaty, though not unconstitutional, does not become the law of the land until it has obtained the sanction of that branch. In this case, and to this end, the Legislature have a right to demand the documents relative to the negotiation of the Treaty, because that Treaty operates on objects specially delegated to the Legislature. He turned to the Constitution. It says that the President shall have the power to make Treaties, by and with the advice and consent of two-thirds of the Senate. It does not say what Treaties. If the clause be taken by itself, then it grants an authority altogether undefined. But the gentlemen quote another clause of the Constitution, where it is said that the Constitution, and the laws made in pursuance thereof, and all Treaties, are the supreme law of the land; and thence, they insist that Treaties made by the President and Senate are the supreme law of the land, and that the power of making Treaties is undefined and

unlimited. He proceeded to controvert this opinion, and contended that it was limited by other parts of the Constitution.

The power of making Treaties is contended to be undefined, then it might extend to all subjects which may properly become the subjects of national compacts. But, he contended, if any other specific powers were given to a different branch of the Government, they must limit the general powers; and, to make the compact valid, it was necessary that, as far as those powers clashed with the general, that the branch holding the specific should concur and give its sanction. If still it is insisted that Treaties are the supreme law of the land, the Constitution and laws are also; and it may be asked, which shall have the preference? Shall a Treaty repeal a law or a law a Treaty? Neither can a law repeal a Treaty, because a Treaty is made with the concurrence of another party — a foreign nation — that has no participation in framing the law: nor can a Treaty made by the President and Senate repeal a law, for the same reason, because the House of Representatives have a participation in making the law. It is a sound maxim in Government, that it requires the same power to repeal a law that enacted it. If so, then it follows that laws and Treaties are not of the same nature; that both operate as the law of the land, but under certain limitations; both are subject to the control of the Constitution; they are made not only by different powers, but those powers are distributed, under different modifications, among the several branches of the Government. Thus no law could be made by the Legislature giving themselves power to execute it; and no Treaty by the Executive, embracing objects specifically assigned to the Legislature without their assent.

To what, he asked, would a contrary doctrine lead? If the power of making Treaties is to reside in the President and Senate unlimitedly: in other words, if, in the exercise of this power, the President and Senate are to be restrained by no other branch of the Government, the President and Senate may absorb all Legislative power — the Executive has, then, nothing to do but to substitute a foreign nation for the House of Representatives, and they may legislate to any extent. If

the Treaty-making power is unlimited and undefined, it may extend to every object of legislation. Under it money may be borrowed, as well as commerce regulated; and why not money appropriated? For, arguing as the gentlemen do, they might say the Constitution says that no money shall be drawn from the Treasury but in consequence of appropriations made by law. But Treaties, whatever provision they may contain, are law; appropriations, therefore, may be made by Treaties. Then it would have been the shortest way to have carried the late Treaty into effect by the instrument itself, by adding to it another article, appropriating the necessary sums. By what provision of the Constitution is the Treaty-making power, agreeably to the construction of the gentlemen, limited? Is it limited by the provisions with respect to appropriations? Not more so than by the other specific powers granted to the Legislature. Is it limited by any law past? If not, it must embrace every thing, and all the objects of legislation. If not limited by existing laws, or if it repeals the laws that clash with it, or if the Legislature is obliged to repeal the laws so clashing, then the Legislative power in fact resides in the President and Senate, and they can, by employing an Indian tribe, pass any law under the color of Treaty. Unless it is allowed that either the power of the House over the purse-strings is a check, or the existing laws cannot be repealed by a Treaty, or that the special powers granted to Congress limit the general power of Treaty-making, there are no bounds to it, it must absorb all others, repeal all laws in contravention to it, and act without control.

To the construction he had given to this part of the Constitution, no such formidable objections could be raised. He did not claim for the House a power of making Treaties, but a check upon the Treaty-making power — a mere negative power; whilst those who are in favor of a different construction advocate a positive and unlimited power. . . .

March 30. — The following Message was received from the President in answer to the resolution of the House:¹

¹ The Resolution was adopted by a vote of 62 to 37.

Gentlemen of the House of Representatives:

With the utmost attention I have considered your resolution of the 24th instant, requesting me to lay before your House a copy of the instructions to the Minister of the United States, who negotiated the Treaty with the King of Great Britain, together with the correspondence and other documents relative to that Treaty, excepting such of the said papers as any existing negotiation may render improper to be disclosed.

In deliberating upon this subject, it was impossible for me to lose sight of the principle which some have avowed in its discussion, or to avoid extending my views to the consequences which must flow from the admission of that principle.

I trust that no part of my conduct has ever indicated a disposition to withhold any information which the Constitution has enjoined upon the President, as a duty, to give, or which could be required of him by either House of Congress as a right; and, with truth, I affirm, that it has been, as it will continue to be, while I have the honor to preside in the Government, my constant endeavor to harmonize with the other branches thereof, so far as the trust delegated to me by the people of the United States, and my sense of the obligation it imposes, to "preserve, protect, and defend the Constitution," will permit.

The nature of foreign negotiations requires caution; and their success must often depend on secrecy; and even, when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiation; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making Treaties in the President with the advice and consent of the Senate; the principle on which the body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign Power, would be to establish a dangerous precedent.

It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment; which the resolution has not expressed. I repeat, that I have no disposition to withhold any information which the duty of my station will permit, or the public good shall require; to be disclosed; and, in fact, all the papers affecting the negotiation with Great Britain were laid before the Senate, when the Treaty itself was communicated for their consideration and advice.

The course which the debate has taken on the resolution of the House, leads to some observations on the mode of making Treaties under the Constitution of the United States.

Having been a member of the General Convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject, and from the first establishment of the Government to this moment, my conduct has exemplified that opinion, that the power of making Treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every Treaty so made, and promulgated, thenceforward becomes the law of the land. It is thus that the Treaty-making power has been understood by foreign nations, and in all the Treaties made with them, *we* have declared, and *they* have believed, that when ratified by the President, with the advice and consent of the Senate, they became obligatory. In this construction of the Constitution every House of Representatives has heretofore acquiesced, and until the present time not a doubt or suspicion has appeared to my knowledge that this construction was not the true one. Nay, they have more than acquiesced; for until now, without controverting the obligation of such Treaties, they have made all the requisite provisions for carrying them into effect.

There is also reason to believe that this construction agrees with the opinions entertained by the State Conventions, when they were deliberating on the Constitution, especially by those who objected to it, because there was not required in Commer-

cial Treaties the consent of two-thirds of the whole number of the members of the Senate, instead of two-thirds of the Senators present, and because, in Treaties respecting territorial and certain other rights and claims, the concurrence of three-fourths of the whole number of the members of both Houses respectively was not made necessary.

It is a fact, declared by the General Convention, and universally understood, that the Constitution of the United States was the result of a spirit of amity and mutual concession. And it is well known that, under this influence, the smaller States were admitted to an equal representation in the Senate, with the larger States; and that this branch of the Government was invested with great powers; for, on the equal participation of those powers, the sovereignty and political safety of the smaller States were deemed essentially to depend.

If other proofs than these, and the plain letter of the Constitution itself, be necessary to ascertain the point under consideration, they may be found in the Journals of the General Convention, which I have deposited in the office of the Department of State. In those Journals it will appear, that a proposition was made, "that no Treaty should be binding on the United States which was not ratified by a law," and that the proposition was explicitly rejected.

As, therefore, it is perfectly clear to my understanding, that the assent of the House of Representatives is not necessary to the validity of a Treaty; as the Treaty with Great Britain exhibits in itself all the objects requiring Legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of the Government, that the boundaries fixed by the Constitution between the different departments should be preserved — a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request.

G. WASHINGTON.

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April 6. — The House accordingly resolved itself into a Committee of the Whole on said Message.

Mr. Blount brought forward the following resolutions:

“Resolved, That, it being declared by the second section of the second article of the Constitution, ‘that the President shall have power, by and with the advice of the Senate, to make Treaties, provided two-thirds of the Senate present concur,’ the House of Representatives do not claim any agency in making Treaties; but, that when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.

“Resolved, That it is not necessary to the propriety of any application from this House to the Executive, for information desired by them, and which may relate to any constitutional functions of the House, that the purpose for which such information may be wanted, or to which the same may be applied, should be stated in the application.”

[The Blount Resolutions were carried by a vote of 57 to 35. But the House afterward voted to carry the treaty into effect by a vote of 51 to 48.]

CHAPTER XXIII

THE ORGANIZATION AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES

THE general structure of Congress is outlined in the Constitution; but aside from certain requirements as to the election of presiding officers, quorum, keeping of a journal and adjournment, the Constitution does not prescribe the internal organization of the Houses of Congress. "Each House may determine the Rules of its own Proceedings." A body of rules first appears in the Journal of the House in 1789. In 1797 Thomas Jefferson prepared a manual of parliamentary practice for his own guidance as President of the Senate. Both sets of rules were based upon familiar practices in the legislatures of the several States or upon the regulations of the English Parliament, which, as Jefferson said, were "a prototype to most of them." The rules adopted in 1802 have been selected to show the procedure of the House at a time when standing committees were beginning to take the place of select committees. The joint rules continued in force without essential change until their abrogation in 1876.

62. *The Opening of a Session.*¹

This being the day appointed by the Constitution for the annual meeting of Congress, the following members of the House of Representatives appeared, produced their credentials, and took their seats in the House, to wit: . . .

A quorum, consisting of a majority being present, the House proceeded, by ballot, to the choice of a Speaker; and, upon examining the ballots, a majority of the votes of the whole House was found in favor of Nathaniel Macon, one of the Representatives for the State of North Carolina: Whereupon, Mr. Macon was conducted to the Chair, and he made his acknowledgments to the House, as follows:

"Gentlemen: Accept my sincere thanks for the honor you have conferred on me, in the choice just made. The duties of the Chair will be undertaken with great diffidence indeed; but it shall be my constant endeavor to discharge them with fidelity and impartiality."

¹ *Annals of Congress*, 7 Cong., 1 Sess. (1801), 309-11.

The House proceeded, in the same manner, to the appointment of a Clerk; and, upon examining the ballots, a majority of the Whole House was found in favor of John Beckley.

The oath to support the Constitution of the United States, as prescribed by law, was then administered by Mr. Griswold, one of the Representatives for the State of Connecticut, to the Speaker; and then the same oath, or affirmation, was administered, by Mr. Speaker, to each of the members present.

A message from the Senate informed the House that a quorum of the Senate is assembled, and ready to proceed to business; and that, in the absence of the Vice President, they have elected the honorable Abraham Baldwin, President of the Senate, *pro tempore*.

Ordered, That a message be sent to the Senate to inform them that a quorum of this House is assembled, and have elected Nathaniel Macon, one of the Representatives of the State of North Carolina, their Speaker, and are now ready to proceed to business; and that the Clerk of this House do go with the said message.

The House proceeded, by ballot, to the choice of a Sergeant-at-Arms, Doorkeeper, and Assistant Doorkeeper; and, upon examining the ballots, a majority of the votes of the whole House was found in favor of Joseph Wheaton, as Sergeant-at-Arms, and, also, an unanimous vote in favor of Thomas Claxton and Thomas Dunn, severally, the former as Doorkeeper, and the latter as Assistant Doorkeeper.

A message from the Senate informed the House that the Senate have appointed a committee on their part, jointly, with such committee as may be appointed on the part of this House, to wait on the President of the United States, and inform him that a quorum of the two Houses is assembled, and ready to receive any communications he may think proper to make to them.

The House proceeded to consider the said message of the Senate, and concurred therein.

Ordered, That Mr. Samuel Smith, Mr. Griswold, and Mr. Davis, be appointed a committee on the part of this House, for the purpose expressed in the message of the Senate.

On motion, it was

Resolved, That the rules and orders of proceeding established by the late House of Representatives, shall be deemed and taken to be the rules and orders of proceeding to be observed in this House, until a revision or alteration of the same shall take place.

Ordered, That a committee be appointed to prepare and report standing rules and orders of proceeding to be observed in this House; and that Mr. Varnum, Mr. Giles, Mr. Leib, Mr. Davenport, and Mr. Henderson, be the said committee.

Ordered, That the Clerk of this House cause the members to be furnished, during the present session, with three newspapers to each member, such as the members, respectively, shall choose, to be delivered at their lodgings.

Mr. Samuel Smith, from the joint committee appointed to wait on the President of the United States, and notify him that a quorum of the two Houses is assembled and ready to receive any communication he may think proper to make to them, reported that the committee had performed that service, and that the President signified to them that he would make a communication to this House, to-morrow, by message.

63. *Rules and Orders of the House of Representatives.*¹

First. — Touching the duty of the Speaker.

He shall take the Chair every day at the hour to which the House shall have adjourned on the preceding day; shall immediately call the members to order; and, on the appearance of a quorum, shall cause the Journal of the preceding day to be read.

He shall preserve decorum and order; may speak to points of order, in preference to other members, rising from his seat for that purpose, and shall decide questions of order, subject to an appeal to the House by any two members.

He shall rise to put a question, but may state it sitting.

Questions shall be distinctly put in this form, to wit: "As

¹ *Annals of Congress*, 7 Cong., 1 Sess. (1801-2), 409-15.

many as are of opinion that (as the case may be) say Ay;" and, after the affirmative voice is expressed, "As many as are of a contrary opinion, say No." If the Speaker doubts, or a division be called for, the House shall divide; those in the affirmative of the question shall first rise from their seats, and afterwards those in the negative. If the Speaker still doubts, or a count be required, the Speaker shall name two members, one from each side, to tell the numbers in the affirmative; which being reported, he shall then name two others, one from each side, to tell those in the negative; which being also reported, he shall rise, and state the decision to the House.

All committees shall be appointed by the Speaker, unless otherwise specially directed by the House, in which case they shall be appointed by ballot; and if, upon such ballot, the number required shall not be elected by a majority of the votes given, the House shall proceed to a second ballot, in which a plurality of votes shall prevail; and in case a greater number than are required to compose or complete the committee shall have an equal number of votes, the House shall proceed to a further ballot or ballots.

In all cases of ballot by the House, the Speaker shall vote; in other cases he shall not vote, unless the House be equally divided, or unless his vote, if given to the majority, will make the division equal; and, in case of such equal division, the question shall be lost.

All acts, addresses, and joint resolutions, shall be signed by the Speaker; and all writs, warrants, or subpoenas, issued by order of the House, shall be under his hand and seal, attested by the Clerk.

In case of any disturbance or disorderly conduct in the gallery or lobby, the Speaker (or Chairman of the Committee of the whole House) shall have power to order the same to be cleared.

Stenographers shall be admitted; and the Speaker shall assign such places to them on the floor, as shall not interfere with the convenience of the House.

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Five standing committees shall be appointed at the commencement of each session, viz:

A Committee of Elections, to consist of seven members;

A Committee of Claims, to consist of seven members;

A Committee of Commerce and Manufactures, to consist of seven members;

A Committee of Ways and Means, to consist of seven members;

And a Committee of Revisal and Unfinished Business, to consist of three members. . . .

It shall be the duty of the said Committee of Ways and Means to take into consideration all such reports of the Treasury Department, and all such propositions relative to the revenue, as may be referred to them by the House; to inquire into the state of the public debt, of the revenue, and of the expenditures, and to report, from time to time, their opinion hereon; to examine into the state of the several public departments, and particularly into the laws making appropriations of moneys, and to report whether the moneys have been disbursed conformably with such laws; and, also, to report, from time to time, such provisions and arrangements, as may be necessary to add to the economy of the departments, and the accountability of their officers. . . .

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Thirdly. — Of Bills.

Every bill shall be introduced by motion for leave, or by an order of the House on the report of a committee, and, in either case, a committee to prepare the same shall be appointed. In cases of a general nature, one day's notice, at least, shall be given of the motion to bring in a bill; and every such motion may be committed.

Every bill shall receive three several readings in the House, previous to its passage; and all bills shall be despatched in order as they were introduced, unless where the House shall direct otherwise; but no bill shall be twice read on the same day, without special order of the House.

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The first reading of the bill shall be for information, and if opposition be made to it the question shall be, "Shall the bill be rejected?" If no opposition be made, or if the question to reject be negatived, the bill shall go to its second reading without a question.

Upon the second reading of the bill, the Speaker shall state it as ready for commitment or engrossment; and if committed, then a question shall be, whether to a select or standing committee, or to a Committee of the whole House; if to a committee of the whole House, the House shall determine on what day. But if the bill be ordered to be engrossed, the House shall appoint the day when it shall be read the third time.

After commitment and report thereof to the House, a bill may be recommitted, or at any time before its passage.

All bills ordered to be engrossed, shall be executed in a fair round hand.

When a bill shall pass, it shall be certified by the Clerk, noting the day of its passing at the foot thereof. . . .

Joint rules and Orders of the Two Houses.

In every case of an amendment of a bill agreed to in one House, and dissented to in the other, if either House shall request a conference, and appoint a committee for that purpose, and the other House shall also appoint a committee to confer, such committees shall, at a convenient hour, to be agreed on by their Chairman, meet in the conference chamber, and state to each other verbally or in writing, as either shall choose, the reason of their respective Houses for and against the amendment, and confer freely thereon.

When a message shall be sent from the Senate to the House of Representatives, it shall be announced at the door of the House, by the Doorkeeper, and shall be respectfully communicated to the Chair, by the person by whom it may be sent.

The same ceremony shall be observed, when a message shall be sent from the House of Representatives to the Senate.

Messages shall be sent by such persons, as a sense of propriety, in each House, may determine to be proper.

While bills are on their passage between the two Houses, they shall be on paper, and under the signature of the Secretary or Clerk of each House respectively.

After a bill shall have passed both Houses, it shall be duly enrolled on parchment, by the Clerk of the House of Representatives, or the Secretary of the Senate, as the bill may have originated in the one or the other House, before it shall be presented to the President of the United States.

When bills are enrolled, they shall be examined by a joint committee of one from the Senate, and two from the House of Representatives, appointed as a standing committee for that purpose, who shall carefully compare the enrolment with the engrossed bills, as passed in the two Houses, and, correcting any errors that may be discovered in the enrolled bills, make their report, forthwith, to the respective Houses.

After examination and report, each bill shall be signed in the respective Houses, first by the Speaker of the House of Representatives, and then by the President of the Senate.

After a bill shall have thus been signed in each House, it shall be presented by the said committee to the President of the United States, for his approbation, it being first endorsed on the back of the roll, certifying in which House the same originated; which endorsement shall be signed by the Secretary or Clerk (as the case may be) of the House in which the same did originate, and shall be entered on the journal of each House. The said committee shall report the day of presentation to the President, which time shall also be carefully entered on the Journal of each House.

All orders, resolutions, and votes, which are to be presented to the President of the United States, for his approbation, shall also, in the same manner, be previously enrolled, examined, and signed, and shall be presented in the same manner, and by the same committee, as provided in case of bills.

When the Senate and House of Representatives shall judge it proper to make a joint address to the President, it shall be presented to him in his audience chamber, by the President of the Senate, in the presence of the Speaker and both Houses.

64. *The Beginnings of the Committee System.*¹

The heads of departments are head clerks. Instead of being the ministry, the organs of the executive power, and imparting a kind of momentum to the operation of the laws, they are precluded of late even from communicating with the House, by reports. In other countries, they may speak as well as act. We allow them to do neither. We forbid even the use of a speaking-trumpet; or, more properly, as the Constitution has ordained that they shall be dumb, we forbid them to explain themselves by signs. Two evils, obvious to you, result from all this. The efficiency of the government is reduced to its minimum — the proneness of a popular body to usurpation is already advancing to its maximum; committees already are the ministers; and while the House indulges a jealousy of encroachment on its functions, which are properly deliberative, it does not perceive that these are impaired and nullified by the monopoly as well as the perversion of information, by these very committees. . . .

The committee of ways and means has not, I am told, written a page these two years. It collects the scraps and fritters of facts at the Treasury, draws crude hasty results tinged with localities. These are not supported by any formed plan of co-operation with the members, and the report calls forth the pride of all the motion-makers. Every subject is suggested in debate, every popular ground of apprehension is invaded. There is nothing to enlighten the House or to guide the public opinion. . . .

¹ Fisher Ames to Hamilton, January 26, 1797. *Works of Alexander Hamilton* (Hamilton ed.), VI, 201-02.

CHAPTER XXIV

THE ORIGIN OF THE TWELFTH AMENDMENT

WHEN the electoral vote for President was counted in February, 1801, it was found that an equal number of votes had been cast for the Republican candidates, Jefferson and Burr. Each had been supported by a majority of the whole number of electors, but it was impossible to designate "the person having the highest number of votes." The election then devolved upon the House of Representatives, which was preponderantly Federalist. In their hatred for Jefferson, certain of the Federalists intrigued to defeat the obvious will of their opponents by bringing Burr into the presidency. When the balloting began, Jefferson received the votes of eight States and Burr of six: the votes of two States were equally divided and so not counted. As the Constitution required a majority of all the States to elect, there was no choice. The result was the same on thirty-five successive ballots. On the thirty-sixth ballot, February 17, Jefferson received the votes of ten States and Burr of four States. The votes of Delaware and South Carolina were blank, because the Federalists abstained from voting. How this result was brought about is described by Bayard of Delaware in his letter to Hamilton. It was this Jefferson-Burr contest which gave impetus to the movement to amend the Constitution so as to prevent a recurrence of such a crisis. The effect of the Twelfth Amendment upon the relative influence of large and small States in choosing a President, and upon the office of Vice-President, was accurately forecast in the debates from which the following extracts are taken.

65. *The Election of 1801.*

(a) *Bayard to Hamilton.*¹

Washington, January 7th, 1801.

. . . I assure you, sir, there appears to be a strong inclination in a majority of the federal party to support Mr. Burr. The current has already acquired considerable force, and manifestly increasing. The vote which the representation of a State enables me to give would decide the question in favor of Mr. Jefferson. At present I am by no means decided as to the object of preference. If the federal party should take up Mr. Burr, I ought certainly to be impressed with the most undoubt-

¹ *Works of Alexander Hamilton* (Hamilton ed.), vi, 506-07.

ing conviction before I separated myself from them. With respect to the personal qualities of the competitors, I should fear as much from the sincerity of Mr. Jefferson (if he is sincere), as from the want of probity in Mr. Burr. There would be really cause to fear that the government would not survive the course of moral and political experiments to which it would be subjected in the hands of Mr. Jefferson. But there is another view of the subject which gives me some inclination in favor of Burr. I consider the State ambition of Virginia as the source of present party. The faction who govern that State, aim to govern the United States. Virginia will never be satisfied but when this state of things exists. If Burr should be the President, they will not govern, and his acceptance of the office, which would disappoint their views, which depend upon Jefferson, would, I apprehend, immediately create a schism in the party which would soon rise into open opposition.

I cannot deny, however, that there are strong considerations, which give a preference to Mr. Jefferson. The subject admits of many doubtful views, and before I resolve on the part I shall take, I shall wait the approach of the crisis which may probably bring with it circumstances decisive of the event. The federal party meet on Friday, for the purpose of forming a resolution as to their line of conduct. I have not the least doubt of their agreeing to support Burr. . . .

(b) *Bayard to Hamilton*.¹

Washington, 8th March, 1801.

. . . In the origin of the business I had contrived to lay hold of all the doubtful votes in the House, which enabled me, according to views which presented themselves, to protract or terminate the controversy.

This arrangement was easily made, from the opinion readily adopted from the consideration, that representing a small State without resources which could supply the means of self-protection, I should not dare to proceed to any length which would jeopardize the constitution or the safety of any State.

¹ *Works of Alexander Hamilton* (Hamilton ed.), VI, 522-24.

When the experiment was fully made, and acknowledged upon all hands to have completely ascertained that Burr was resolved not to commit himself, and that nothing remained but to appoint a President by law, or leave the government without one, I came out with the most explicit and determined declaration of voting for Jefferson. You cannot well imagine the clamor and vehement invective to which I was subjected for some days. We had several caucuses. All acknowledged that nothing but desperate measures remained, which several were disposed to adopt, and but few were willing openly to disapprove. We broke up each time in confusion and discord, and the manner of the last ballot was arranged but a few minutes before the ballot was given. Our former harmony, however, has since been restored.

The public declarations of my intention to vote for Jefferson, to which I have alluded, were made without a general consultation, knowing that it would be an easier task to close the breach which I foresaw, when it was the result of an act done without concurrence, than if it had proceeded from one against a decision of the party. Had it not been for a single gentleman from Connecticut, the eastern States would finally have voted in blank, in the same manner as done by South Carolina and Delaware; but, because he refused, the rest of the delegation refused; and because Connecticut insisted on continuing the ballot for Burr, New Hampshire, Massachusetts, and Rhode Island, refused to depart from their former vote.

The means existed of electing Burr, but this required his co-operation. By deceiving one man (a great blockhead), and tempting two (not incorruptible), he might have secured a majority of the States. . . .

66. *Debate in the Senate on the Proposed Amendment.*¹

Mr. White of Delaware:— The United States are now divided, and will probably continue so, into two great political parties; whenever, under this amendment, a Presidential election shall come round, and the four rival candidates be pro-

¹ December 2, 1803. *Annals of Congress*, 8 Cong., 1 Sess., 141-84 *passim*.

posed, two of them only will be voted for as President — one of these two must be the man; the chances in favor of each will be equal. Will not this increased probability of success afford more than double the inducement to those candidates, and their friends, to tamper with the Electors, to exercise intrigue, bribery, and corruption, as in an election upon the present plan, where the whole four would be voted for alike, where the chances against each are as three to one, and it is totally uncertain which of the gentlemen may succeed to the high office? And there must, indeed, be a great scarcity of character in the United States, when, in so extensive and populous a country, four citizens cannot be found, either of them worthy even of the Chief Magistracy of the nation. But, Mr. President, I have never yet seen the great inconvenience that has been so much clamored about, and that will be provided against in future by substituting this amendment. There was, indeed, a time when it became necessary for the House of Representatives to elect, by ballot, a President of the United States from the two highest in vote, and they were engaged here some days, as I have been told, in a very good-humored way, in the exercise of that constitutional right. . . . I will not undertake to say that there was no danger apprehended on that occasion. I know many of the friends of the Constitution had their fears; the experiment however proved them groundless; but what was the danger apprehended pending the election in the House of Representatives? Was it that they might choose Colonel Burr or Mr. Jefferson President? Not at all; they had, notwithstanding what had been said on this subject by the gentleman from Maryland, (Mr. Wright) a clear constitutional right to choose either of them, as much so as the Electors in the several States had to vote for them in the first instance; the particular man was a consideration of but secondary importance to the country; the only ground of alarm was, lest the House should separate without making any choice, and the Government be without a head, the consequences of which no man could well calculate. The present attempt . . . is taking advantage of a casualty to alter the Constitution that astonished everyone

when it happened, and that no man can imagine, in the ordinary course of events, will ever arise again. . . .

It has of late, Mr. President, become fashionable to attach very little importance to the office of Vice President, to consider it a matter but of small consequence who the man may be; to view his post merely as an idle post of honor, and the incumbent as a cipher in the Government; or according to the idea expressed by an honorable member from Georgia, (Mr. Jackson,) quoting, I believe, the language of some Eastern politician, as a fifth wheel to a coach; but in my humble opinion this doctrine is both incorrect and dangerous. The Vice President is not only the second officer of Government in point of rank, but of importance, and should be a man possessing and worthy of the confidence of the nation. I grant, sir, should this designating mode of election succeed, it will go very far to destroy, not the certain or contingent duties of the office, for the latter by this resolution are considerably extended, but what may be much more dangerous, the personal consequence and worth of the officer; by rendering the Electors more indifferent about the reputation and qualification of the candidate, seeing they vote for him but as a secondary character; and which may occasion this high and important trust to be deposited in very unsafe hands. . . . The convention in constructing this part of the Constitution, in settling the first and second offices of the Government, and pointing out the mode of filling, aware of the probability of the Vice President succeeding to the office of President, endeavored to attach as much importance and respectability to his office as possible, by making it uncertain at the time of voting, which of the persons voted for should be President, and which Vice President; so as to secure the election of the best men in the country, or at least those in whom the people reposed the highest confidence, to the two offices — thus filling the office of Vice President with one of our most distinguished citizens, who would give respectability to the Government, and in case of the Presidency becoming vacant, having at his post a man constitutionally entitled to succeed, who had been honored with the second largest

number of the suffrages of the people for the same office, and who of consequence would be probably worthy of the place, and competent to its duties. Let us now, Mr. President, examine for a moment the certain effect of the change about to be made, or what must be the operation of this designating principle, if you introduce it into the Constitution. Now the Elector cannot designate, but must vote for two persons as President, leaving it to circumstances not within his power to control which shall be the man: of course he will select two characters, each suitable for that office, and the second highest in vote must be the Vice President; but upon this designating plan the public attention will be entirely engrossed in the election of the President, in making one great man. The eyes of each contending party will be fixed exclusively upon their candidate for this first and highest office; . . . the Vice-Presidency will either be left to chance, or what will be much worse, prostituted to the basest purposes; character, talents, virtue, and merit, will not be sought after in the candidate. The question will not be asked, is he capable? is he honest? But can he by his name, by his connections, by his wealth, by his local situation, by his influence or his intrigues, best promote the election of a President? He will be made a mere stepping-stone of ambition. Thus, by the death or other constitutional inability of the President to do the duties of the office, you may find at the head of your Government, as First Magistrate of the nation, a man who has either smuggled or bought himself into office; who, not having the confidence of the people, or feeling the constitutional responsibility of his place, but attributing his elevation merely to accident, and conscious of the superior claims of others, will be without restraint upon his conduct, without that strong inducement to consult the wishes of the people, and to pursue the true interests of the nation, that the hope of popular applause, and the prospect of re-election, would offer. . . .

Mr. Tracy of Conn. — Nothing can be more obvious, than the intention of the plan adopted by our Constitution for choosing a President. The Electors are to nominate two per-

sons, of whom they cannot know which will be President; this circumstance not only induces them to select both from the best men; but gives a direct advantage into the hands of the small States even in the electoral choice. For they can always select from the two candidates set up by the Electors of large States, by throwing their votes upon their favorite, and of course giving him a majority; or, if the Electors of the large States should, to prevent this effect, scatter their votes for one candidate, then the Electors of the small States would have it in their power to elect a Vice President. So that, in any event, the small States will have a considerable agency in the election. But if the discriminating or designating principle is carried, as contained in this resolution, the whole, or nearly the whole right and agency of the small States, in the electoral choice of Chief Magistrate, is destroyed, and their chance of obtaining a federative choice by States, if not destroyed, is very much diminished. . . .

The whole power of election is now vested in the two parties; numbers and States, or, great and small States; and it is demonstration itself, if you increase the power of the one, in just such proportion you diminish that of the other. Do the gentlemen suppose that the public will, when constitutionally expressed by a majority of States, in pursuance of the federative principle of our Government, is of less validity, or less binding upon the community at large, than the public will expressed by a popular majority? The framers of your Constitution, the people who adopted it, meant, that the public will, in the choice of a President, should be expressed by Electors, if they could agree, and if not, the public will should be expressed by a majority of the States, acting in their federative capacity, and that in both cases the expression of the public will should be equally binding.

It is pretended that the public will can never properly or constitutionally be expressed by a majority of numbers of the people, or of the House of Representatives. This may be a pleasing doctrine enough to great States; but it is certainly incorrect. Our Constitution has given the expression of the public will, in a variety of instances, other than that of the

choice of President, into very different hands from either House of Representatives or the people at large. The President and Senate, and in many cases the President alone, can express the public will, in appointments of high trust and responsibility, and it cannot be forgotten that the President sometimes expresses the public will by removals. Treaties, highly important expressions of the public will, are made by the President and Senate; and they are the supreme law of the land. In the several States, many great offices are filled, and even the Chief Magistracy, by various modes of election. The public will is sometimes expressed by pluralities instead of majorities, sometimes by both branches of the Legislatures, and sometimes by one, and in certain contingencies, elections are settled by lot. The people have adopted constitutions containing such regulations, and experience has proved that they are well calculated to preserve their liberties and promote their happiness. From what good or even pardonable motive, then, can it be urged that the present mode of electing our President has a tendency to counteract the public will? Do gentlemen intend to destroy every federal feature in this Constitution? And is this resolution a precursor to a complete consolidation of the Union, and to the establishment of a simple republic? — Or will it suffice to break down every federative feature which secures to one portion of the Union, to the small States, their rights? . . .

Mr. Taylor of Virginia. — This idea of federalism ought to be well discussed by the smaller States, before they will suffer it to produce the intended effect — that of exciting their jealousy against the larger. To him it appeared to be evidently incorrect. Two principles sustain our Constitution: one a majority of the people, the other a majority of the States; the first was necessary to preserve the liberty or sovereignty of the people; the last, to preserve the liberty or sovereignty of the States. But both are founded in the principle of majority; and the effort of the Constitution is to preserve this principle in relation both to the people and the States, so that neither species of sovereignty or independence should be able to destroy the other. . . .

For this great purpose certain political functions are assigned to be performed, under the auspices of the State or federal principle, and certain others under the popular principle. It was the intention of the Constitution that these functions should be performed in conformity to its principle. If that principle is in fact a government of a minority, then these functions ought to be performed by a minority. When the federal principle is performing a function, according to this idea, a majority of the States ought to decide. And, by the same mode of reasoning, when the popular principle is performing a function, then a minority of the people ought to decide. This brings us precisely to the question of the amendment. It is the intention of the Constitution that the popular principle shall operate in the election of a President and Vice President. It is also the intention of the Constitution that the popular principle, in discharging the functions committed to it by the Constitution, should operate by a majority and not by a minority. That the majority of the people should be driven, by an unforeseen state of parties, to the necessity of relinquishing their will in the election of one or the other of these officers, or that the principle of majority, in a function confided to the popular will, should be deprived of half its rights, and be laid under a necessity of violating its duty to preserve the other half, is not the intention of the Constitution. . . .

Sir, it could never have been the intention of the Constitution to produce a state of things by which a majority of the popular principle should be under the necessity of voting against its judgment to secure a President, and by which a minor faction should acquire a power capable of defeating the majority in the election of President, or of electing a Vice President contrary to the will of the electing principle. To permit this abuse would be a fraudulent mode of defeating the operation of the popular principle in this election, in order to transfer it to the federal principle — to disinherit the people for the sake of endowing the House of Representatives; whereas it was an accidental and not an artificial disappointment in the election of a President, against which the Constitution intended

to provide. A fair and not an unfair attempt to elect was previously to be made by the popular principle, before the election was to go into the House of Representatives. And if the people of all the States, both large and small, should, by an abuse of the real design of the Constitution, be bubbled out of the election of executive power, by leaving to them the nominal right of an abortive effort, and transferring to the House of Representatives the substantial right of a real election, nothing will remain but to corrupt the election in that House by some of those abuses of which elections by diets are susceptible, to bestow upon executive power an aspect both formidable and inconsistent with the principles by which the Constitution intended to mould it.

The great check imposed upon executive power was a popular mode of election; and the true object of jealousy, which ought to attract the attention of the people of every State, is any circumstance tending to diminish or destroy that check. It was also a primary intention of the Constitution to keep executive power independent of legislative; and although a provision was made for its election by the House of Representatives in a possible case, that possible case never was intended to be converted into the active rule, so as to destroy in a degree the line of separation and independency between the executive and legislative power. The controversy is not therefore between larger and smaller States, but between the people of every State and the House of Representatives. Is it better that the people — a fair majority of the popular principle — should elect executive power; or, that a minor faction should be enabled to embarrass and defeat the judgment and will of this majority, and throw the election into the House of Representatives? This is the question. . . .

67. *The Twelfth Amendment.*¹

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at

¹ *Revised Statutes of the United States* (1878), 30. This amendment went into effect September 25, 1804.

least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

PART FOUR. THE DEVELOPMENT OF NATIONAL SOVEREIGNTY

CHAPTER XXV

THE FEDERAL COMPACT AND THE DOCTRINE OF STRICT CONSTRUCTION

THE fear of "consolidation," ever present in the minds of democrats like Jefferson in the early years of the Republic, led to reiterated emphasis upon the contractual nature of the Constitution, the principle of State sovereignty, and the doctrine of strict construction. This doctrine is elaborated by Jefferson in his opinion on the constitutionality of the proposed national bank. The most forcible expression of Jeffersonian principles is contained in the Kentucky Resolutions of 1798, which were drafted by Jefferson and adopted by the legislature of that State, then controlled by his partisans. The Kentucky Resolutions of the following year suggest "the rightful remedy" for usurpation of power by the Federal Government; but Jefferson was not disposed to elaborate this ultimate remedy. He was content "to leave the matter in such a train as that we may not be committed absolutely to push the matter to extremities, & yet may be free to push as far as events will render prudent."

68. *Jefferson on the Constitutionality of a National Bank.*¹

. . . I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people."² To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States, by the Constitution.

I. They are not among the powers specially enumerated: for

¹ *Writings of Thomas Jefferson* (Ford ed.), v, 285-87.

² The twelfth of the amendments then before the States for ratification; the tenth of those adopted.

these are: 1st. A power to lay taxes for the purpose of paying the debts of the United States; but no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, its origination in the Senate would condemn it by the Constitution.

2d. "To borrow money." But this bill neither borrows money nor ensures the borrowing it. The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public. The operation proposed in the bill, first, to lend them two millions, and then to borrow them back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please.

3. To "regulate commerce with foreign nations, and among the States, and with the Indian tribes." To erect a bank, and to regulate commerce, are very different acts. He who erects a bank, creates a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulates commerce thereby. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling. Besides, if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every State, as to its external. For the power given to Congress by the Constitution does not extend to the internal regulation of the commerce of a State, (that is to say of the commerce between citizen and citizen,) which remain exclusively with its own legislature; but to its external commerce only, that is to say, its commerce with another State, or with foreign nations, or with the Indian tribes. Accordingly the bill does not propose the measure as a regulation of trade, but as "productive of considerable advantages to trade." Still less are these powers covered by any other of the special enumerations.

II. Nor are they within either of the general phrases, which are the two following: —

1. To lay taxes to provide for the general welfare of the United States, that is to say, "to lay taxes for *the purpose* of providing for the general welfare." For the laying of taxes is

the *power*, and the general welfare the *purpose* for which the power is to be exercised. They are not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless.

It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please.

It is an established rule of construction where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly no such universal power was meant to be given them. It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect. It is known that the very power now proposed as a *means* was rejected as an *end* by the Convention which formed the Constitution. A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.

2. The second general phrase is, "to make all laws *necessary* and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank therefore is not *necessary*, and consequently not authorized by this phrase.

It has been urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true: yet the Constitution allows only the means which are "*necessary*," not those which are merely "convenient" for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory. . . .

69. *Kentucky Resolutions of 1798.*¹

I. *Resolved*, that the several States composing the United States of America, are not united on the principle of unlimited submission to their general government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each State to itself, the residuary mass of right to their own self-government; and that whenever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each State acceded as a State, and is an integral party, its co-States forming, as to itself, the other party: That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

II. *Resolved*, that the Constitution of the United States having delegated to Congress a power to punish treason, counter-

¹ Shaler, *Kentucky*, in *American Commonwealths Series*, 409-16.

feiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offenses against the laws of nations, and no other crimes whatever, and it being true as a general principle, and one of the amendments to the Constitution having also declared "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," therefore also the same act of Congress passed on the 14th day of July, 1798, and entitled "An act in addition to the act entitled an act for the punishment of certain crimes against the United States;" as also the act passed by them on the 27th day of June, 1798, entitled "An act to punish frauds committed on the Bank of the United States" (and all other their acts which assume to create, define, or punish crimes other than those enumerated in the Constitution), are altogether void and of no force, and that the power to create, define, and punish such other crimes is reserved, and of right appertains solely and exclusively to the respective States, each within its own Territory.

III. *Resolved*, that it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people;" and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States, or to the people: That thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated rather than the use be destroyed; and thus also they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this State, by a

law passed on the general demand of its citizens, had already protected them from all human restraint or interference: And that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, defamation equally with heresy and false religion, are withheld from the cognizance of Federal tribunals. That therefore the act of the Congress of the United States passed on the 14th day of July, 1798, entitled "An act in addition to the act for the punishment of certain crimes against the United States," which does abridge the freedom of the press, is not law, but is altogether void and of no effect.

IV. *Resolved*, that alien friends are under the jurisdiction and protection of the laws of the State wherein they are; that no power over them has been delegated to the United States, nor prohibited to the individual States distinct from their power over citizens; and it being true as a general principle, and one of the amendments to the Constitution having also declared that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," the act of the Congress of the United States passed on the 22d day of June, 1798, entitled "An act concerning aliens," which assumes power over alien friends not delegated by the Constitution, is not law, but is altogether void and of no force.

V. *Resolved*, that in addition to the general principle as well as the express declaration, that powers not delegated are reserved, another and more special provision inserted in the Constitution from abundant caution has declared, "that the migration or importation of such persons as any of the States

now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." That this Commonwealth does admit the migration of alien friends described as the subject of the said act concerning aliens; that a provision against prohibiting their migration is a provision against all acts equivalent thereto, or it would be nugatory; that to remove them when migrated is equivalent to a prohibition of their migration, and is therefore contrary to the said provision of the Constitution, and void.

VI. *Resolved*, that the imprisonment of a person under the protection of the laws of this Commonwealth on his failure to obey the simple order of the President to depart out of the United States, as is undertaken by the said act entitled "An act concerning aliens," is contrary to the Constitution, one amendment to which has provided, that "no person shall be deprived of liberty without due process of law," and that another having provided "that in all criminal prosecutions, the accused shall enjoy the right to a public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense," the same act undertaking to authorize the President to remove a person out of the United States who is under the protection of the law, on his own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him, without having witnesses in his favour, without defense, without counsel, is contrary to these provisions also of the Constitution, is therefore not law, but utterly void and of no force. That transferring the power of judging any person who is under the protection of the laws, from the courts to the President of the United States, as is undertaken by the same act concerning aliens, is against the article of the Constitution which provides, that "the judicial power of the United States shall be vested in courts, the judges of which shall hold their offices during good behavior," and that the said act is void for that reason also; and it is further to be noted, that this transfer

of judiciary power is to that magistrate of the general government who already possesses all the executive, and a qualified negative in all the legislative powers.

VII. *Resolved*, that the construction applied by the general government (as is evinced by sundry of their proceedings) to those parts of the Constitution of the United States which delegate to Congress a power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defense, and general welfare of the United States, and to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the government of the United States, or any department thereof, goes to the destruction of all the limits prescribed to their power by the Constitution: That words meant by that instrument to be subsidiary only to the execution of the limited powers ought not to be so construed as themselves to give unlimited powers, nor a part so to be taken as to destroy the whole residue of the instrument: That the proceedings of the general government under color of these articles will be a fit and necessary subject for revisal and correction at a time of greater tranquillity, while those specified in the preceding resolutions call for immediate redress.

VIII. *Resolved*, that the preceding Resolutions be transmitted to the Senators and Representatives in Congress from this Commonwealth, who are hereby enjoined to present the same to their respective Houses, and to use their best endeavors to procure, at the next session of Congress, a repeal of the aforesaid unconstitutional and obnoxious acts.

IX. *Resolved*, lastly, that the Governor of this Commonwealth be, and is hereby authorized and requested to communicate the preceding Resolutions to the Legislatures of the several States, to assure them that this Commonwealth considers Union for specified National purposes, and particularly for those specified in their late Federal Compact, to be friendly to the peace, happiness, and prosperity of all the States: that faithful to that compact according to the plain intent and meaning in which it was understood and acceded to by the

several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the States all the powers of self-government, and transfer them to a general and consolidated government, without regard to the special delegations and reservations solemnly agreed to in that compact, is not for the peace, happiness, or prosperity of these States: And that, therefore, this Commonwealth is determined, as it doubts not its co-States are, tamely to submit to undelegated and consequently unlimited powers in no man or body of men on earth: that if the acts before specified should stand, these conclusions would flow from them; that the general government may place any act they think proper on the list of crimes and punish it themselves, whether enumerated or not enumerated by the Constitution as cognizable by them: that they may transfer its cognizance to the President or any other person, who may himself be the accuser, counsel, judge, and jury, whose suspicions may be the evidence, his order the sentence, his officer the executioner, and his breast the sole record of the transaction: that a very numerous and valuable description of the inhabitants of these States being by this precedent reduced as outlaws to the absolute dominion of one man, and the barrier of the Constitution thus swept away from us all, no rampart now remains against the passions and the powers of a majority of Congress, to protect from a like exportation or other more grievous punishment the minority of the same body, the legislatures, judges, governors, and counselors of the States, nor their other peaceable inhabitants who may venture to reclaim the constitutional rights and liberties of the State and people, or who for other causes, good or bad, may be obnoxious to the views or marked by the suspicions of the President, or be thought dangerous to his or their elections or other interests, public or personal: that the friendless alien has indeed been selected as the safest subject of a first experiment, but the citizen will soon follow, or rather has already followed: for, already has a sedition act marked him as its prey: that these and successive acts of the same character, unless arrested on the threshold, may tend to drive these States into revolution

and blood, and will furnish new calumnies against Republican governments, and new pretexts for those who wish it to be believed, that man cannot be governed but by a rod of iron: that it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism: free government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited Constitutions to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which and no further our confidence may go; and let the honest advocate of confidence read the alien and sedition acts, and say if the Constitution has not been wise in fixing limits to the government it created, and whether we should be wise in destroying those limits; let him say what the government is if it be not a tyranny, which the men of our choice have conferred on the President, and the President of our choice has assented to and accepted over the friendly strangers, to whom the mild spirit of our country and its laws had pledged hospitality and protection: that the men of our choice have more respected the bare suspicions of the President than the solid rights of innocence, the claims of justification, the sacred force of truth, and the forms and substance of law and justice. In questions of power then let no more be heard of confidence in man, but bind him down from mischief by the claims of the Constitution. That this Commonwealth does therefore call on its co-States for an expression of their sentiments on the acts concerning aliens, and for the punishment of certain crimes herein before specified, plainly declaring whether these acts are or are not authorized by the Federal Compact. And it doubts not that their sense will be so announced as to prove their attachment unaltered to limited government, whether general or particular, and that the rights and liberties of their co-States will be exposed to no dangers by remaining embarked on a common bottom with their own: That they will concur with this Commonwealth in considering the said acts so palpably against the Constitution as to amount to an undisguised declaration, that

the compact is not meant to be the measure of the powers of the general government, but that it will proceed in the exercise over these States of all powers whatsoever: That they will view this as seizing the rights of the States and consolidating them in the hands of the general government with a power assumed to bind the States (not merely in cases made Federal) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent: That this would be to surrender the form of government we have chosen, and to live under one deriving its powers from its own will, and not from our authority; and that the co-States, recurring to their natural right in cases not made Federal, will concur in declaring these acts void and of no force, and will each unite with this Commonwealth in requesting their repeal at the next session of Congress.

70. *Kentucky Resolutions of 1799.*¹

Resolved, That this Commonwealth considers the Federal Union, upon the terms and for the purposes specified in the late compact, conducive to the liberty and happiness of the several States: That it does now unequivocally declare its attachment to the Union, and to that compact, agreeably to its obvious and real intention, and will be among the last to seek its dissolution: That if those who administer the General Government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the State Governments, and the creation upon their ruins of a General Consolidated Government, will be the inevitable consequence: That the principle and construction contended for by sundry of the state legislatures, that the General Government is the exclusive judge of the extent of the powers delegated to it, stop nothing [short] of *despotism* — since the discretion of those who administer the government, and not the *Constitution*, would be the measure of their powers: That the several states who formed that instrument being sovereign and independent, have the

¹ Elliot, *Debates*, IV, 570-72.

unquestionable right to judge of the infraction; and, *That a Nullification by those sovereignties, of all unauthorized acts done under color of that instrument is the rightful remedy*; That this Commonwealth does, under the most deliberate reconsideration, declare, that the said Alien and Sedition Laws are, in their opinion, palpable violations of the said Constitution; and, however cheerfully it may be disposed to surrender its opinion to a majority of its sister states, in matters of ordinary or doubtful policy, yet, in no [so] momentous regulations like the present, which so vitally wound the best rights of the citizen, it would consider a silent acquiescence as highly criminal: That although this commonwealth, as a party to the federal compact, will bow to the laws of the Union, yet, it does, at the same [time] declare, that it will not now, or ever hereafter, cease to oppose in a constitutional manner, every attempt at what quarter soever offered, to violate that compact. And, finally, in order that no pretext or arguments may be drawn from a supposed acquiescence, on the part of this Commonwealth in the constitutionality of those laws, and be thereby used as precedents for similar future violations of the Federal compact — this Commonwealth does now enter against them its solemn PROTEST.

CHAPTER XXVI

THE POWER TO ACQUIRE TERRITORY AND TO GOVERN ACQUIRED TERRITORY

THE purchase of the province of Louisiana by the Jefferson administration was in direct violation of the doctrines of that great party leader. The whole incident is an excellent illustration of the manner in which the Constitution has been expanded, not only by that "subtle corps of sappers and miners," as Jefferson called the judiciary, but also by the executive branch of the Government. The power assumed by Congress over the territory thus acquired is an equally good example of the development of the Constitution through congressional action. Subsequently, the Supreme Court sustained the action of both the executive and the legislative branches of the Government.

71. *Jefferson on the Purchase of Louisiana.*¹

. . . The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into the Union. The Executive, in seizing the fugitive occurrence which so much advances the good of the country, has done an act beyond the Constitution. The Legislators, in casting behind them metaphysical subtleties and risking themselves like faithful servants, must ratify and pay for it and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves, had they been in a situation to do it. . . .

72. *Senator Taylor on the Louisiana Treaty.*²

There have been, Mr. President, two objections made against the treaty; one that the United States cannot constitutionally acquire territory; the other, that the treaty stipulates for the admission of a new State into the Union; a stipulation which the treaty-making power is unable to comply with. To these objections I shall endeavor to give answers not heretofore urged.

¹ Thomas Jefferson to John C. Breckenridge, August 12, 1803. *Writings of Thomas Jefferson* (Washington ed.), IV, 500-01.

² November 3, 1803. *Annals of Congress*, 8 Cong., 1 Sess., 49-52.

Before a confederation, each State in the Union possessed a right, as attached to sovereignty, of acquiring territory, by war, purchase, or treaty. This right must be either still possessed, or forbidden both to each State and to the General Government, or transferred to the General Government. It is not possessed by the States separately, because war and compacts with foreign Powers and with each other are prohibited to a separate State; and no other means of acquiring territory exist. By depriving every State of the means of exercising the right of acquiring territory, the Constitution has deprived each separate State of the right itself. Neither the means nor the right of acquiring territory are forbidden to the United States; on the contrary, in the fourth article of the Constitution, Congress is empowered "to dispose of and regulate the territory belonging to the United States." This recognises the right of the United States to hold territory. The means of acquiring territory consist of war and compact; both are expressly surrendered to Congress and forbidden to the several States; and no right in a separate State to hold territory without its limits is recognised by the Constitution, nor any mode of effecting it possible, consistent with it. The means of acquiring and the right of holding territory, being both given to the United States, and prohibited to each State, it follows that these attributes of sovereignty once held by each State are thus transferred to the United States; and that, if the means of acquiring and the right of holding, are equivalent to the right of acquiring territory, then this right merged from the separate States to the United States, as indispensably annexed to the treaty-making power, and the power of making war; or, indeed, is literally given to the General Government by the Constitution.

Having proved, sir, that the United States may constitutionally acquire, hold, dispose of, and regulate territory, the other objection to be considered is, whether the third article of the treaty does stipulate that Louisiana shall be erected into a State? It is conceded that the treaty-making power, cannot, by treaty, erect a new State, however they may stipulate for it. I premise, that in the construction of this article, it is proper

to recollect that the negotiators must be supposed to have understood our Constitution. It became very particularly their duty to do so, because, in this article itself, they have recited "the principles of the Constitution" as their guide. Hence, it is obvious, they did not intend to infringe, but to adhere to those principles, and therefore, if the article will admit of a construction consistent with this presumable knowledge and intention of the negotiators, the probability of its accuracy will be greater than one formed in a supposition that the negotiators were either ignorant of that which they ought to have known, or that they fraudulently professed a purpose which they really intended to defeat. The following construction is reconcilable with what the negotiators ought to have known, and with what they professed to intend.

Recollect, sir, that it has been proved that the United States may acquire territory. Territory, so acquired, becomes from the acquisition itself a portion of the territories of the United States, or may be united with their territories without being erected into a State. An union of territory is one thing; of States, another. Both are exemplified by an actual existence. The United States possess territory, comprised in the union of territory, and not in the union of States. Congress is empowered to regulate or dispose of territorial sections of the Union, and have exercised the power; but it is not empowered to regulate or dispose of State sections of the Union. The citizens of these territorial sections are citizens of the United States, and they have all the rights of citizens of the United States; but such rights do not include those political rights arising from State compacts or governments, which are dissimilar in different States. Supposing the General Government or treaty-making power have no right to add or unite States and State citizens to the Union, yet they have a power of adding or uniting to it, territory and territorial citizens of the United States.

The territory is ceded by the first article of the treaty. It will no longer be denied that the United States may constitutionally acquire territory. The third article declares that "the inhabitants of the ceded territory shall be incorporated in the

Union of the United States." And these words are said to require the territory to be erected into a State. This they do not express, and the words are literally satisfied by incorporating them into the Union as a territory, and not as a State. The Constitution recognises and the practice warrants an incorporation of a Territory and its inhabitants into the Union, without admitting either as a State. And this construction of the first member of the article is necessary to shield its two other members from a charge of surplusage, and even absurdity. For if the words "the inhabitants of the ceded territory shall be incorporated in the Union of the United States" intended that Louisiana and its inhabitants should become a State in the Union of States, there existed no reason for proceeding to stipulate that these same inhabitants should be made "citizens as soon as possible, according to the principles of the Federal Constitution." Their admission into the Union of States would have made them citizens of the United States. Is it not then absurd to suppose that the first member of this third article, intended to admit Louisiana into the Union as a State, which would instantly entitle the inhabitants to the benefit of the article of the Constitution, declaring that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and yet to have gone on to stipulate for citizenship, under the limitation "as soon as possible, according to the principles of the Federal Constitution" after it had been bestowed without limitation? Again; the concluding member of the article is to bestow "protection in the mean time;" incorporating this stipulation, and the stipulation for citizenship, with the construction which accuses the treaty of unconstitutionality, the article altogether must be understood thus, "the inhabitants of the ceded territory shall be taken into the Union of States, which will instantly give them all the rights of citizenship, after which they shall be made citizens as soon as possible; and after they are taken into the Union of States, they shall be protected in the interim between becoming a State in the Union, and being made citizens, in their liberty, property and religion."

By supposing the first member of the article to require that the inhabitants and their territory shall be incorporated in the Union, in the known and recognised political character of a Territory, these inconsistencies are avoided, and the article reconciled to the Constitution, as understood by the opposers of the bill; the stipulation also for citizenship "as soon as possible" according to the principles of the Constitution, and the delay meditated by these words, and the subsequent words "in the mean time" so utterly inconsistent with the instantaneous citizenship, which would follow an admission in the Union as a State, are both fully explained. Being incorporated in the Union as a Territory, and not as a State, a stipulation for citizenship became necessary; whereas it would have been unnecessary had the inhabitants been incorporated as a State, and not as a Territory. And as they were not to be invested with citizenship by becoming a State, the delay which would occur between the incorporation of the Territory into the Union and the arrival of the inhabitants to citizenship according to the principles of the Constitution, under some uniform rule of naturalization, exhibited an interim which demanded the concluding stipulation, for "protection in the meantime for liberty, property, and religion." As a State of the Union, they would not have needed a stipulation for the safety of their "liberty, property and religion;" as a Territory, this stipulation would govern and restrain the undefined power of Congress to make "rules and regulations for Territories." . . .

73. *The American Insurance Company v. Canter*.¹

Mr. Chief Justice Marshall said in part:

. . . The course which the argument has taken, will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

¹ Supreme Court of the United States, 1828. 1 Peters, 512.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession, contains the following provision: "The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a territory belonging to the

United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed "an act for the establishment of a territorial government in Florida," and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act, the territorial legislature enacted the law now under consideration. . . .

74. *Power of Congress over Acquired Territory.*¹

The House resolved itself into a Committee of the Whole on the bill from the Senate, entitled, "An act to enable the President of the United States to take possession of the territories ceded by France to the United States, by the treaty concluded at Paris on the thirtieth of April last, and for other purposes."

. . . .

[Sec. 2. *And be it further enacted*, That, until Congress shall have made provision for the temporary government of the said territories, all the military, civil, and judicial powers, exercised by the officers of the existing government of the same, shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct.]

Mr. R. Griswold. — The powers proposed to be conferred by the gentleman are without limits. It may be necessary for the welfare of the people, to secure their religion. The President may be, therefore, constituted grand inquisitor, he may also be made a king, and likewise a judge, for the good of the people. I am not, said Mr. G., willing myself to give him such extensive powers. . . .

As to the idea of some gentlemen, that this territory, not

¹ Debate in the House of Representatives, November 3, 1803. *Annals of Congress*, 8 Cong., 1 Sess., 49-52.

being a part of the United States, but a colony, and that therefore we may do as we please with it, it is not correct. If we acquire a colony by conquest or purchase — and I believe we may do both — it is not consistent with the Constitution to delegate to the President, even over a colony thus acquired, all power, legislative, executive, and judicial; for this would make him the despot of the colony.

Mr. Rodney. — There is a wide distinction between States and Territories, and the Constitution appears clearly to indicate it. . . . By the third section of the fourth article of the Constitution, it is declared that “the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State.”

This provision does not limit or restrain the authority of Congress with respect to Territories, but vests them with full and complete power to exercise a sound discretion generally on the subject. . . .

. . . But by a recurrence to the ordinance for the government of that Territory, and to the laws of Congress subsequently made, it will be seen that Congress have conceived themselves to be possessed of the right and have actually exercised the power, to alter the Territory, by adding to or taking from it as they thought proper, and by making rules variant from those under which it was originally organized. . . . Congress has a power in the Territories, which they cannot exercise in States; and that the limitations of power, found in the Constitution, are applicable to States and not to Territories.

75. *Serè et al. v. Pilot et al.*¹

Mr. Chief Justice Marshall for the Court said in part:

. . . Whether the citizens of the Territory of Orleans are to be considered as the citizens of a State, within the meaning of the constitution, is a question of some difficulty, which

¹ Supreme Court of the United States, 1810. 6 Cranch, 332.

would be decided, should one of them sue in any of the circuit courts of the United States. The present inquiry is limited to a suit brought by or against a citizen of the Territory, in the District Court of Orleans. The power of governing and of legislating for a Territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Orleans. Congress has given them a legislative, an executive, and a judiciary with such powers as it has been their will to assign to those departments respectively. . . .

76. *New Orleans v. Winter et al.*¹

Mr. Chief Justice Marshall for the Court said in part:

. . . It has been attempted to distinguish a Territory from the District of Columbia; but the court is of opinion, that this distinction cannot be maintained. They may differ in many respects, but neither of them is a State, in the sense in which that term is used in the Constitution. Every reason assigned for the opinion of the court, that a citizen of Columbia was not capable of suing in the courts of the United States, under the Judiciary Act, is equally applicable to a citizen of a Territory. Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana. . . .

¹ Supreme Court of the United States, 1816. 1 Wheaton, 91.

CHAPTER XXVII

THE POWER OF THE FEDERAL JUDICIARY TO DECLARE ACTS OF CONGRESS VOID

IN the case of *Marbury v. Madison* the Supreme Court took under consideration an application by one William Marbury for a writ of *mandamus* to be directed to James Madison, Secretary of State of the United States, requiring him to issue to the plaintiff a commission as justice of the peace. This commission, it was alleged, had been duly signed by the President of the United States and given to the Secretary of State for delivery. The delivery, however, had not been made. Chief Justice Marshall held that Marbury was entitled to his commission and that a writ of *mandamus* was a proper remedy. The Court then took under consideration the further question whether such a writ could issue from the Supreme Court. This was the first instance in which the Supreme Court declared against the validity of an act of Congress.

77. *Marbury v. Madison*.¹

Mr. Chief Justice Marshall delivered the opinion of the Court:

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the

¹ Supreme Court of the United States, 1803. 1 Cranch, 137.

United States; and, consequently, in some form may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." . . .

To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. . . .

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so estab-

lished, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of

the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practi-

cal and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially

to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government — if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed

to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

78. *Jefferson on the Usurpation of the Federal Judiciary.*¹

In denying the right they usurp, of exclusively explaining the constitution, I go further than you do, if I understand rightly your quotation, from *The Federalist*, of an opinion that "the judiciary is the last resort in relation to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived." If this opinion be sound, then indeed is our constitution a complete *felo de se*. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scare-crow; that such opinions as the one you combat, sent cautiously out, as you observe also, by detachment, not belonging to the case often, but sought for out of it, as if to rally the public opinion beforehand to their views, and to indicate the line they are to walk in, have been so quietly passed over as never to have excited animadversion, even in a speech of any one of the body entrusted with impeachment.

The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law. My construction of the constitution is very differ-

¹ Jefferson to Judge Roane, September 6, 1819. *Writings of Thomas Jefferson* (Washington ed.), VII, 134-35.

ent from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal. I will explain myself by examples, which, having occurred while I was in office, are better known to me, and the principles which governed them.

CHAPTER XXVIII

PENNSYLVANIA AND THE FEDERAL JUDICIARY

THE prolonged controversy between Pennsylvania and the federal judiciary dated back to 1779, when the Committee or Court of Appeals of the old Congress reversed the judgment of the Pennsylvania Court of Admiralty in the case of the sloop *Active*. The resistance of Pennsylvania led Gideon Olmstead and others who claimed the award to bring suit in the federal district court, over which Judge Peters presided. The decision was again in favor of Olmstead, but again the legislature of Pennsylvania interposed to prevent the payment of the prize money. The Attorney-General then applied to the Supreme Court, in behalf of Olmstead, for a writ of *mandamus* commanding Judge Peters to enforce his judgment. Chief Justice Marshall granted the writ in the following opinion. The writ was issued, but the federal marshal was prevented from serving it by a body of State militia. He then summoned a *posse comitatus* of two thousand men. Bloodshed seemed imminent, but after some delay the Pennsylvania authorities gave way and paid over the sum in dispute. Later, the commanding officer of the State militia and others who had resisted the United States marshal were indicted and sentenced to fine and imprisonment. President Madison pardoned them, however, on the ground that "they had acted under a mistaken sense of duty." The paramount authority of the National Government was thus sustained at every point in the controversy. The appended resolutions were passed by the legislature of Pennsylvania in the heat of the controversy. They met with no approval in other States. On the contrary, the legislature of Virginia pointed out "that a tribunal is already provided by the Constitution of the United States, to wit: the Supreme Court, more eminently qualified from their habits and duties, from the mode of their selection, and from the tenure of their offices, to decide the disputes aforesaid in an enlightened and impartial manner, than any other tribunal which could be erected."

79. *The United States v. Judge Peters.*¹

Mr. Chief Justice Marshall delivered the opinion of the Court as follows:

With great attention, and with serious concern, the court has considered the return made by the judge for the District of Pennsylvania to the *mandamus* directing him to execute the sentence pronounced by him in the case of *Gideon Olmstead and*

¹ Supreme Court of the United States, 1809. 5 Cranch, 135.

others v. Rittenhouse's Executrixes, or to show cause for not so doing. The cause shown is an act of the legislature of Pennsylvania, passed subsequent to the rendition of his sentence. This act authorizes and requires the governor to demand, for the use of the state of Pennsylvania, the money which had been decreed to Gideon Olmstead and others; and which was in the hands of the executrixes of David Rittenhouse; and, in default of payment, to direct the Attorney General to institute a suit for the recovery thereof. This act further authorizes and requires the governor to use any further means he may think necessary for the protection of what it denominates "the just rights of the state," and also to protect the persons and properties of the said executrixes of David Rittenhouse, deceased, against any process whatever, issued out of any federal court in consequence of their obedience to the requisition of the said act.

If the legislatures of the several states may, at will, annul the judgment of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union and in averting consequences so fatal to themselves.

The act in question does not, in terms, assert the universal right of the state to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction.

If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the District Court of Pennsylvania, over the case in which that jurisdiction was

exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.

In the early part of the war between the United States and Great Britain, Gideon Olmstead and others, citizens of Connecticut, who say they had been carried to Jamaica as prisoners, were employed as part of the crew of the sloop *Active*, bound from Jamaica to New York, and laden with a cargo for the use of the British army in that place. On the voyage they seized the vessel, confined the captain, and sailed for Egg Harbor. In sight of that place, the *Active* was captured by the *Convention*, an armed ship belonging to the state of Pennsylvania, brought into port, libeled and condemned as prize to the captors. From this sentence Gideon Olmstead and others, who claimed the vessel and cargo, appealed to the Court of Appeals established by Congress, by which tribunal the sentence of condemnation was reversed, the *Active* and her cargo condemned as prize to the claimants, and process was directed to issue out of the Court of Admiralty, commanding the marshal of that court to sell the said vessel and cargo, and to pay the net proceeds to the claimants.

The mandate of the appellate court was produced in the inferior court, the judge of which admitted the general jurisdiction of the court established by Congress, as an appellate court, but denied its power to control the verdict of a jury which had been rendered in favor of the captors, the officers and crew of the *Convention*; and therefore refused obedience to the mandate; but directed the marshal to make the sale, and, after deducting charges, to bring the residue of the money into court, subject to its future order.

The claimants then applied to the judges of appeals for an injunction to prohibit the marshal from paying the money, arising from the sales, into the Court of Admiralty; which was awarded, and served upon him: in contempt of which, on the 4th of January, 1778, he paid the money to the judge, who acknowledged the receipt thereof at the foot of the marshal's return.

On the 1st of May, 1779, George Ross, the judge of the Court of Admiralty, delivered to David Rittenhouse, who was then treasurer of the state of Pennsylvania, the sum of 11,496*l.* 9*s.* 9*d.*, in loan-office certificates; which was the proportion of the prize money to which that state would have been entitled, had the sentence of the Court of Admiralty remained in force. On the same day, David Rittenhouse executed a bond of indemnity to George Ross, in which, after reciting that the money was paid to him for the use of the state of Pennsylvania, he binds himself to repay the same, should the said George Ross be thereafter compelled, by due course of law, to pay that sum according to the decree of the Court of Appeals.

These loan-office certificates were in the name of Matthew Clarkson, who was marshal of the Court of Admiralty, and were dated the 6th of November, 1778. Indents were issued on them to David Rittenhouse, and the whole principal and interest were afterwards funded by him, in his own name, under the act of Congress making provision for the debt of the United States.

Among the papers of David Rittenhouse was a memorandum, made by himself at the foot of a list of the certificates mentioned above, in these words: "Note. The above certificates will be the property of the state of Pennsylvania, when the state releases me from the bond I gave in 1778, to indemnify George Ross, Esq., judge of the admiralty, for paying the 50 original certificates into the treasury, as the state's share of the prize."

The state did not release David Rittenhouse from the bond mentioned in this memorandum. These certificates remained in the private possession of David Rittenhouse, who drew the interest on them during his life, and after his death they remained in possession of his representatives; against whom the libel in this case was filed, for the purpose of carrying into execution the decree of the Court of Appeals.

While this suit was depending, the state of Pennsylvania forbore to assert its title, and, in January, 1803, the court decreed in favor of the libellants; soon after which, the legislature passed the act which has been stated.

It is contended that the federal courts were deprived of

jurisdiction, in this cause, by that amendment of the constitution which exempts states from being sued in those courts by individuals. This amendment declares, "that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; not can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case, the suit was not instituted against the state or its treasurer, but against the executrices of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.

If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificates in question was vested in the state of Pennsylvania.

By the highest judicial authority of the nation it has been long since decided, that the Court of Appeals erected by Congress had full authority to revise and correct the sentence of the courts of admiralty of the several states, in prize causes.

That question, therefore, is at rest. Consequently, the decision of the Court of Appeals in this case annulled the sentence of the Court of Admiralty, and extinguished the interest of the state of Pennsylvania in the *Active* and her cargo, which was acquired by that sentence. The full right to that property was immediately vested in the claimants, who might rightfully pursue it, into whosoever hands it might come. These certificates, in the hands, first, of Matthew Clarkson, the marshal, and afterwards of George Ross, the judge of the Court of Admiralty, were the absolute property of the claimants. Nor did they change their character on coming into the possession of David Rittenhouse.

Although Mr. Rittenhouse was treasurer of the state of Pennsylvania, and the bond of indemnity which he executed states the money to have been paid to him for the use of the state of Pennsylvania, it is apparent that he held them in his own right, until he should be completely indemnified by the state. The evidence to this point is conclusive. The original certificates do not appear to have been deposited in the state treasury, to have been designated in any manner as the property of the state, or to have been delivered over to the successor of David Rittenhouse. They remained in his possession. The indents, issued upon them for interest, were drawn by David Rittenhouse, and preserved with the original certificates. When funded as part of the debt of the United States, they were funded by David Rittenhouse, and the interest was drawn by him. The note made by himself at the foot of the list, which he preserved, as explanatory of the whole transaction, demonstrates that he held the certificates as security against the bond he had executed to George Ross; and that bond was obligatory, not on the state of Pennsylvania, but on David Rittenhouse, in his private capacity.

These circumstances demonstrate, beyond the possibility of doubt, that the property which represented the *Active* and her cargo, was in possession, not of the state of Pennsylvania, but of David Rittenhouse as an individual; after whose death it passed, like other property, to his representatives.

Since, then, the state of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the District Court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited; and, consequently, the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory *mandamus* must be awarded.

80. *Resolutions of the Legislature of Pennsylvania.*¹

. . . And whereas the causes and reasons which have produced this conflict between the General and State governments should be made known, not only that the State may be justified to her sister States, who are equally interested in the preservation of the State rights; but to evince to the Government of the United States that the Legislature, in resisting encroachments on their rights, are not acting in a spirit of hostility to the legitimate powers of the United States' courts; but are actuated by a disposition to compromise, and to guard against future collisions of power, by an amendment to the Constitution: and that, whilst they are contending for the rights of the State, that it will be attributed to a desire of preserving the Federal Government itself, the best features of which must depend upon keeping up a just balance between the General and State governments, as guaranteed by the Constitution. . . .

Therefore,

Resolved by the Senate and House of Representatives of the Commonwealth of Pennsylvania, &c. That, as a member of the

¹ April 3, 1809. *Annals of Congress*, 11 Cong., 2 Sess., Appendix, 2253-69 *passim*.

Federal Union, the Legislature of Pennsylvania acknowledges the supremacy, and will cheerfully submit to the authority of the General Government, as far as that authority is delegated by the Constitution of the United States. But, whilst they yield to this authority, when exercised within Constitutional limits, they trust they will not be considered as acting hostile to the General Government, when, as guardians of the State rights, they can not permit an infringement of those rights, by an unconstitutional exercise of power in the United States' courts.

Resolved, That in a Government like that of the United States, where there are powers granted to the General Government, and rights reserved to the States, it is impossible, from the imperfections of language, so to define the limits of each, that difficulties should not sometimes arise from a collision of powers: and it is to be lamented, that no provision is made in the Constitution for determining disputes between the General and State governments by an impartial tribunal, when such cases occur.

Resolved, That from the construction the United States' courts give to their powers, the harmony of the States, if they resist encroachments on their rights, will frequently be interrupted; and if to prevent this evil, they should, on all occasions yield to stretches of power, the reserved rights of the States will depend on the arbitrary power of the courts.

Resolved, That, should the independence of the States, as secured by the Constitution, be destroyed, the liberties of the people in so extensive a country cannot long survive. To suffer the United States' courts to decide on State rights will, from a bias in favor of power, necessarily destroy the Federal part of our Government: And whenever the government of the United States becomes consolidated, we may learn from the history of nations what will be the event.

To prevent the balance between the General and State governments from being destroyed, and the harmony of the States from being interrupted,

Resolved, That our Senators in Congress be instructed, and

our Representatives requested, to use their influence to procure an amendment to the Constitution of the United States, that an impartial tribunal may be established to determine disputes between the General and State governments; and, that they be further instructed to use their endeavors, that in the meanwhile, such arrangements may be made, between the Governments of the Union and of this State, as will put an end to existing difficulties.

Resolved, That the Governor be requested to transmit a copy of these resolutions, to the Executive of the United States, to be laid before Congress, at their next session. And that he be authorized and directed to correspond with the President on the subject in controversy, and to agree to such arrangements as may be in the power of the Executive to make, or that Congress may make, either by the appointment of commissioners or otherwise, for settling the difficulties between the two Governments.

And, That the Governor be also requested to transmit a copy to the Executives of the several States in the Union with a request, that they may be laid before their respective Legislatures. . . .

CHAPTER XXIX

NULLIFICATION IN NEW ENGLAND

THE hostility of New England to the embargo policy of Jefferson was due to both economical and political considerations. The embargo was urged as the alternative to war; but even so the people of New England were put to a severe test. A temporary interdiction of trade might have been borne with a degree of equanimity; but a long-continued embargo was considered a blow aimed at Federalist commerce and trade. Evasion of the laws was carried to such a point that Jefferson was obliged to recommend measures of enforcement which he admitted were odious and dangerous. The legislatures of Massachusetts, Rhode Island, and Connecticut pronounced these acts unjust, oppressive, and unconstitutional. Connecticut went still further, and refused to comply with the demands of the National Government for the use of State militia to enforce the embargo.

A similar attitude was assumed by Massachusetts during the War of 1812, which the Federalists denounced as a "party and not a national war." When General Dearborn made requisition for militia for service in defense of the coast, Governor Strong refused to obey the call. His reasons for not complying are stated in his correspondence, and were indorsed by the judges of the supreme court of the State. But in the case of *Martin v. Mott*, fifteen years later, the Supreme Court of the United States took an adverse view of the position assumed by the New England authorities.

81. *Secretary of War to the Governor of Connecticut.*¹

Sir, — The pressure of the embargo although sensibly felt by every description of our fellow citizens, has yet been cheerfully borne by most of them, under a conviction that it was a temporary evil, and a necessary one to save us from greater and more permanent evils, the loss of property and surrender of rights: but it would have been more cheerfully borne but for the knowledge that, while honest men were religiously observing it, the unprincipled along our sea-coasts and frontiers, were fraudulently evading it: and that in some parts they had even dared to break through it openly by an armed force too powerful to be opposed by the collector and his assistants.

¹ *American Register* (1809), 177-78. January 18, 1809.

To put an end to this scandalous insubordination to the laws, the legislature has authorized the president of the United States to empower proper persons to employ militia for preventing or suppressing armed or riotous assemblages of persons resisting the custom-house officers in the exercise of their duties, or opposing or violating the embargo laws. He sincerely hopes that during the short time these restrictions are expected to continue, no other instances will take place of a crime of so deep a die. But it is made his duty, to take the measures necessary to meet it. He has directed me, therefore, to request you, as commanding officer of the militia of your state, to appoint some officer of the militia, of known respect for the laws, in or near to each port of entry within your state, with orders, when applied to by the collector of the district to assemble immediately a sufficient force of his militia, and to employ them efficaciously to maintain the authority of the laws respecting the embargo; and that you notify to each collector the officer to whom by your appointment he is to apply for aid when necessary. The president has referred this appointment to your excellency, because your knowledge of characters, or means of obtaining it, will enable you to select one who can be most confided in to exercise so serious a power, with all the discretion, the forbearance, the kindness, even, which the enforcement of the law will possibly admit; ever bearing in mind that the life of a citizen is never to be endangered but as the last melancholy effort for the maintenance of order and obedience to the laws.

Your excellency will please to instruct the officers so appointed, to have correct muster and pay rolls made out and transmitted to this department, of such militia as they may find it necessary, in the execution of their duties to call into actual service. . . .

82. *Governor of Connecticut to the Secretary of War.*¹

Sir, — I have received your letter of the 18th January, conveying to me a request of the president of the United States,

¹ *American Register* (1809), 178-79. February 4, 1809.

that as commander in chief of the militia of this state, I would appoint a select number of officers of our militia, to whom the collectors of the customs may apply for military aid in certain cases, which may *by them*, be thought necessary for compelling obedience to the laws of Congress enforcing the embargo. . . .

I have reflected that neither the constitution, nor statute of this state, have given to the commander in chief of its militia, any authority to make such appointment of officers as has been requested; nor does my information suggest to me, any authority given to the president of the United States, derived either from the constitution or laws of the United States, to call upon the executive of an individual state to take an agency in appointments, such as are contemplated by the request mentioned.

Conceiving also as I do, and believing it to be the opinion of the great mass of the citizens of this state, that the late law of Congress for the more rigorous enforcement of the embargo, is *unconstitutional* in many of its provisions, interfering with the state sovereignties, and subversive of the guaranteed rights, privileges and immunities of the citizens of the United States; I have from these considerations, deemed it peculiarly and highly improper for a state executive to contribute his *volunteer* aid in support of laws bearing such an aspect.

And when I reflect upon the extent of measures which must probably be resorted to for the enforcement of this law; a law which from the means contemplated for its support and execution, it would seem is to require all the military and naval force of the union, I cannot suppress my deep anxiety for the events it may produce.

I might also add, that I cannot be induced to risk my *responsibility* to the public by contributing towards placing a "serious power" in the hands, and at the disposal of men in whom I should not be able, in all instances, to repose the fullest confidence; more especially, when their individual acts and measures, may not always be under the regulation of the best motives, and when their proceedings in execution of this law,

will naturally tend to put at extreme hazard, the peace, lives, property and dearest rights of our fellow-citizens.

Under this view therefore of the subject, and with these considerations before me, my mind has been led to a serious and decided determination to decline a compliance with your request, and to have no agency in the appointments which the president has been pleased to refer to me.

While I take the liberty of thus declining this agency, you will be pleased to recollect, that on all former occasions, when *constitutional* applications have been made to this state, for the execution of the *constitutional* laws and requisitions of the union, the promptitude and readiness of their compliance, have merited and received the approbation, if not the applause, of the general administration of the United States. . . .

83. *Resolutions of the General Assembly of Connecticut.*¹

. . . After solemn deliberation and advisement thereon, the general assembly are decided in the opinion, and do resolve, that the acts aforesaid are a permanent system of measures, abandoning undeniable rights; interdicting the exercise of constitutional privileges, and unprecedented in the annals of nations; and do contain provisions for exercising arbitrary powers, grievous to the good people of this state, dangerous to their common liberties, incompatible with the constitution of the United States, and encroaching upon the immunities of this state.

Resolved, That to preserve the union, and support the constitution of the United States, it becomes the duty of the legislature of the states, in such a crisis of affairs, vigilantly to watch over, and vigorously to maintain, the powers not delegated to the United States, but reserved to the states respectively, or to the people; and that a due regard to this duty, will not permit this assembly to assist, or concur in giving effect to the aforesaid unconstitutional acts.

Resolved, That this assembly highly approve of the conduct of his excellency the governor, in declining to designate per-

¹ *American Register* (1809), 180-81. March 1, 1809.

sons to carry into effect, by the aid of *military power* the act of the United States, enforcing the embargo, and that his letter, addressed to the secretary for the department of war, containing his refusal to make such designation, be recorded in the public records of this state, as an example to persons, who may hold places of distinguished trust, in this free and independent republic.

Resolved, That the persons holding executive offices under this state, are restrained by the duties which they owe this state, from affording any official aid or co-operation in the execution of the acts aforesaid; and that his excellency the governor be requested, as commander in chief of the military force of this state, to cause these resolutions to be published in general orders: And that the secretary of this state be, and he is hereby directed to transmit copies of the same to the several sheriffs and town clerks.

Resolved, That his excellency the governor be requested to communicate the foregoing resolutions to the president of the United States, with an assurance that this assembly regret, that they are thus obliged under a sense of paramount public duty, to assert the unquestionable rights of this state, to abstain from any agency in the execution of measures, which are unconstitutional and despotic.

Resolved, That this assembly accord in sentiment, with the senate and house of representatives, of the commonwealth of Massachusetts, that it is expedient to effect certain alterations in the constitution of the United States; and will zealously co-operate with that commonwealth and any other of the states, in all legal and constitutional measures for procuring such amendments to the constitution of the United States, as shall be judged necessary to obtain more effectual protection and defence for commerce; and to give to the commercial states their fair and just consideration in the union, and for affording permanent security, as well as present relief, from the oppressive measures under which they now suffer. . . .

84. *Governor of Massachusetts to the Secretary of War.*¹

. . . As an opinion generally prevailed, that the Governor had no authority to call the militia into actual service, unless one of the exigencies contemplated by the Constitution exists, I thought it expedient to call the council together, and, having laid before them your letter, and those I have received from General Dearborn, I requested their advice on the subject of them.

The Council advised "that they were unable from a view of the Constitution of the United States, and the letters aforesaid, to perceive that any exigency exists which can render it advisable to comply with said requisition. But, as upon important questions of law, and upon solemn occasions, the Governor and Council have authority to require the opinion of the Justices of the Supreme Judicial Court, it is advisable to request the opinion of the Supreme Court upon the following questions, viz.:

"1st. Whether the commanders in chief of the militia of the several states have a right to determine, whether any of the exigencies contemplated by the Constitution of the United States exist; so as to require them to place the militia, or any part of it, in the service of the United States, at the request of the President, to be commanded by him pursuant to acts of Congress?"

"2nd. Whether, when either of the exigencies exist, authorizing the employing the militia in the service of the United States, the militia thus employed, can be lawfully commanded by any officer, but of the militia, except by the President of the United States?"

I enclose a copy of the answer given by the judges to these questions. . . . I am fully disposed to afford all the aid to the measures of the national government which the Constitution requires of me, but I presume it will not be expected, or desired, that I shall fail in the duty which I owe to the people of this state, who have confided their interests to my care.

¹ *Senate Documents*, 13 Cong., 3 Sess., *Report of the Committee on Military Affairs*, February 28, 1815, 34-48, *passim*.

85. *Opinion of the Judges of the Supreme Court of Massachusetts.*¹

On the construction of the Federal and State constitutions must depend the answers to the several questions proposed. As the militia of the several states may be employed in the service of the United States, for the three specific purposes of executing the laws of the Union, of suppressing insurrections, and of repelling invasions, the opinion of the judges is requested, whether the Commanders-in-Chief of the militia of the several states have a right to determine whether any of the exigencies aforesaid exist so as to require them to place the militia, or any part of it, in the service of the United States, at the request of the President, to be commanded by him pursuant to acts of Congress.

It is the opinion of the undersigned, that this right is vested in the Commanders-in-Chief of the militia of the several states.

The Federal Constitution provides, that whenever either of these exigencies exist, the militia may be employed, pursuant to some act of Congress, in the service of the United States; but no power is given, either to the President or to Congress, to determine that either of the said exigencies do in fact exist. As this power is not delegated to the United States by the Federal Constitution, nor prohibited by it to the states, it is reserved to the states, respectively; and from the nature of the power, it must be exercised by those with whom the states have respectively entrusted the chief command of the militia.

It is the duty of these commanders to execute this important trust, agreeably to their several states, respectively, without respect to the laws or officers of the United States, in all cases, except those specially provided in the Federal Constitution. They must, therefore, determine whether either of the special cases exist, obliging them to relinquish the execution of this trust, and to render themselves and the militia subject to the command of the President. A different construction, giving to Congress the right to determine when these special cases exist,

¹ *Senate Documents*, 13 Cong., 3 Sess., *Report of the Committee on Military Affairs*, February 28, 1815, 38-42.

authorizing them to call forth the whole of the militia, and taking them from the Commanders-in-Chief of the several states, and subjecting them to the command of the President, would place all the militia, in effect, at the will of Congress, and produce a military consolidation of the states, without any constitutional remedy against the intentions of the people, when ratifying the Constitution. Indeed, since passing the act of Congress of February 28, 1795, chapter 101, vesting in the President the power of calling forth the militia when the exigencies mentioned in the Constitution shall exist, if the President has the power of determining when those exigencies exist, the militia in the several states is, in effect, at his command, and subject to his control.

No inconvenience can reasonably be presumed to result from the construction which vests in the Commanders-in-Chief of the militia, in the several states, the right of determining when the exigencies exist, obliging them to place the militia in the service of the United States. These exigencies are of such a nature, that the existence of them can be easily ascertained by, or made known to, the Commanders-in-Chief of the militia; and when ascertained, the public interest will produce prompt obedience to the acts of Congress.

Another question proposed to the consideration of the judges, is, whether, when either of the exigencies exist, authorizing the employing of the militia in the service of the United States, the militia thus employed can be lawfully commanded by any officer not of the militia, except by the President of the United States?

. . . The officers of the militia are to be appointed by the states, and the President may exercise his command of the militia by the officers of the militia, duly appointed; but we know of no constitutional provision authorizing any officer of the army of the United States to command the militia, or authorizing any officer of the militia to command the army of the United States. The Congress may provide laws for the government of the militia when in actual service; but to extend this power to placing them under the command of an officer

not of the militia, except the President, would render nugatory the provision that the militia are to have officers appointed by the states. . . .

86. *Martin v. Mott*.¹

Mr. Justice Story delivered the opinion of the Court:

. . . It has not been denied here that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by Congress to the President, is, doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power

¹ Supreme Court of the United States, 1827, 12 Wheaton, 19.

itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the confederacy," these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment. . . .

CHAPTER XXX

THE DOCTRINE OF LIBERAL CONSTRUCTION OF THE CONSTITUTION

THE case of *M'Culloch v. Maryland* came before the Supreme Court on writ of error from the Court of Appeals of that Commonwealth. M'Culloch, cashier of the Baltimore branch of the Bank of the United States, had violated a law of Maryland which imposed a tax on all banks not chartered by the legislature; and judgment had been rendered against him. The plaintiff in error now contested the validity of the act passed by the legislature of Maryland, while the defendant, "a sovereign State," denied the obligation of the act of Congress which incorporated the national bank. In delivering the opinion of the Court, Mr. Chief Justice Marshall stated in phraseology which has become classic the doctrine of liberal construction of the Constitution.

87. *M'Culloch v. The State of Maryland et al.*¹

Mr. Chief Justice Marshall delivered the opinion of the Court:

The first question made in the cause is, has Congress power to incorporate a bank? . . .

If any one proposition could command the universal assent of mankind, we might expect that it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. . . .

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely

¹ Supreme Court of the United States, 1819. 4 Wheaton, 316.

described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can

never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. . . .

The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. . . . No sufficient reason is,

therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. . . .

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but only such as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to

those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense — in that sense which common usage justifies. The word “necessary” is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying “imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,” with that which authorizes Congress “to make all laws which shall be necessary and proper for carrying into execution” the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word “necessary” by prefixing the word “absolutely.” This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow

limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. . . .

. . . This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons: —

1. The clause is placed among the powers of Congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If then, their intention had been, by this clause, to restrain the free use of means which might otherwise

have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. . . .

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land. . . .

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire: —

2. Whether the State of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded — if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and in-

compatible with, these powers to create and preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. . . .

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. . . .

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government. . . .

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the State. . . .

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. . . .

CHAPTER XXXI

JURISDICTION OF THE SUPREME COURT OVER STATE COURTS

IN two notable cases, *Martin v. Hunter's Lessee*, and *Cohens v. Virginia*, the Supreme Court of the United States asserted the right to review and reverse decisions of the State courts when those decisions were adverse to alleged federal rights. In both cases the twenty-fifth section of the Judiciary Act of 1789 was under fire. In the case of *Cohens v. Virginia*, the counsel for the Commonwealth said: "The appellate jurisdiction conferred by the Constitution on the Supreme Court is merely authority to revise the decisions of the inferior courts of the United States. . . . Appellate jurisdiction signifies judicial power over the decisions of inferior tribunals of the same sovereignty. . . . Congress is not authorized to make the supreme court or any other court of a State an inferior court. . . . The inferior courts spoken of in the Constitution are manifestly to be held by federal judges. The judicial power to be exercised is the judicial power of the United States; the errors to be corrected are those of that judicial power; and there can be no inferior courts exercising the judicial power of the United States other than those constituted and ordained by Congress." These contentions are fully met in the following selection from the opinion of the Court in the case of *Cohens v. Virginia*.

88. *Martin, Heir at Law and Devisee of Fairfax, v. Hunter's Lessee.*¹

Mr. Justice Story delivered the opinion of the Court:

This is a writ of error from the court of appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February term, 1813, to be carried into due execution. The following is the judgment of the court of appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States; that so much of the 25th section of the act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the

¹ Supreme Court of the United States, 1816. 1 Wheaton, 304.

supreme court to this court, is not in pursuance of the constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were *coram non judice*, in relation to this court, and that obedience to its mandate be declined by the court." . . .

The third article of the constitution is that which must principally attract our attention. . . .

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the constitution to the supreme court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the supreme court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned the supreme

court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualifications as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to all cases arising under the constitution, laws, and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States, might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus fœderis* should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any act of Congress.

On the other hand, if, as has been contended, a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the supreme court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances, it must be held that the appellate power would extend to state courts;

for the constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the constitution in relation to the whole appellate power.

But it is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution, or laws of any State to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the constitution, laws, and treaties of the United States, "the supreme law of the land."

A moment's consideration will show us the necessity and propriety, of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same State, and performance thereof is sought in the courts of that State; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose, at the trial, the defendant sets up in his defense a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared that no State shall make anything but gold

or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defense be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defense that the crime was created by an *ex post facto* act of the State, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defense? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution. . . .

On the whole, the court are of opinion, that the appellate

power of the United States does extend to cases pending in the state courts; and that the 25th section of the Judiciary Act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one. . . .

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

89. *Cohens v. The State of Virginia.*¹

Mr. Chief Justice Marshall delivered the opinion of the Court:

. . . The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States, adopted the present constitution.

If it could be doubted whether, from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks

¹ Supreme Court of the United States, 1821. 6 Wheaton, 264.

with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases, of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution, the subordination of the state governments to the constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial depart-

ment, are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case. . . .

The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a state court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a State; and as being no more connected with it, in any respect whatever, than the court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they

have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire, — for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution?

We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects. . . .

CHAPTER XXXII

CONSTRUCTIVE JUDICIAL INTERPRETATION OF THE CONSTITUTION

AMERICAN judges have never admitted that they make law: they only find the law and interpret it. The courts aim to ascertain the purposes of the framers of laws and constitutions. Nevertheless, cases arise when the constitution and laws must be applied to conditions which the law-makers could not have foreseen. The Supreme Court has been called upon repeatedly to decide what the Fathers would have purposed if they could have foreseen changed conditions. The interpretation of the commerce clause by the Supreme Court, in the case of *Gibbons v. Ogden*, illustrates this interesting process.

90. *Gibbons v. Ogden*.¹

Mr. Chief Justice Marshall delivered the opinion of the Court:

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the constitution and laws of the United States.

They are said to be repugnant, —

1. To that clause in the constitution which authorizes Congress to regulate commerce.
2. To that which authorizes Congress to promote the progress of science and useful arts. . . .

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to

¹ Supreme Court of the United States, 1824. 9 Wheaton, 1.

one of its significations. Commerce, undoubtedly, is traffic, but it is something more, — it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word “commerce” to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that “commerce,” as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted, — that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that

power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation. . . .

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is inter-

mingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the

means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. . . .

The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations, and among the several States, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the States may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the constitution, and still retain it, except so far as they have sur-

rendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain. . . .

The sole question is, can a State regulate commerce with foreign nations and among the States while Congress is regulating it? . . .

These acts were cited at the bar for the purpose of showing an opinion in Congress that the States possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress, and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of Congress for the regulation of commerce, do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything which the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act, granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the in-

strumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steam-boats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know, that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest, by the act already mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a State inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter into an examination of that part of the constitution which empowers Congress to promote the progress of science and the useful arts. . . .

PART FIVE. NATIONAL SOVEREIGNTY VERSUS STATE RIGHTS

CHAPTER XXXIII

THE ADMISSION OF NEW STATES

THE constitutional significance of the debates on the admission of Missouri arises in the first instance from the attempts made to attach to an enabling act conditions relating to slavery. In the session of 1818-19, Representative Tallmadge moved an amendment providing that the future introduction of slavery and involuntary servitude should be prohibited in the new State. The bill thus amended passed the House but failed in the Senate. A dead-lock followed. In the next session, the prohibitory proviso was renewed in a somewhat different form, known as the "Taylor Amendment." The following extracts touch only upon the question of restriction, not upon the political aspects of the controversy. The Treaty of 1803 was drawn again into consideration because the Territory of Missouri had been erected out of the Louisiana Purchase. The Thomas Amendment, eventually adopted by both Houses as a compromise, appears as the eighth section of the enabling act.

91. *Representative Taylor on the Admission of Missouri.*¹

First. Has Congress power to require of Missouri a constitutional prohibition against the further introduction of slavery, as a condition of her admission into the Union?

Second. If the power exist, is it wise to exercise it?

Congress has no power unless it be expressly granted by the constitution, or necessary to the execution of some power clearly delegated. What, then, are the grants made to Congress in relation to the Territories? The third section of the fourth article declares, that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property, belonging to the United States." It would be difficult to devise a more comprehensive grant of power. The whole subject is put at the disposal of

¹ February 15, 1819. *Annals of Congress*, 15 Cong., 2 Sess., 1171-74 *passim*.

Congress, as well as the right of judging what regulations are proper to be made, as the power of making them is clearly granted. Until admitted into the Union, this political society is a territory; all the preliminary steps relating to its admission are territorial regulations. Hence, in all such cases, Congress has exercised the power of determining by whom the constitution should be made, how its framers should be elected, when and where they should meet, and what propositions should be submitted to their decision. After its formation, the Congress examine its provisions, and, if approved, admit the State into the Union, in pursuance of a power delegated by the same section of the constitution, in the following words: "New States may be admitted by the Congress into the Union." This grant of power is evidently alternative; its exercise is committed to the sound discretion of Congress; no injustice is done by declining it. But if Congress has the power of altogether refusing to admit new States, much more has it the power of prescribing such conditions of admission as may be judged reasonable. The exercise of this power, until now, has never been questioned. The act of 1802, under which Ohio was admitted into the Union, prescribed the condition that its constitution should not be repugnant to the ordinance of 1787. The sixth article of that ordinance declares, "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted." The same condition was imposed by Congress on the people of Indiana and Illinois. These States have all complied with it, and framed constitutions excluding slavery. Missouri lies in the same latitude. Its soil, productions, and climate are the same, and the same principles of government should be applied to it.

But it is said that, by the treaty of 1803, with the French Republic, Congress is restrained from imposing this condition. The third article is quoted as containing the prohibition. It is in the following words: . . . The inhabitants of the ceded territory, when transferred from the protection of the French Republic, in regard to the United States, would have stood in

the relation of aliens. The object of the article doubtless was to provide for their admission to the rights of citizens, and their incorporation into the American family. The treaty made no provision for the erection of new States in ceded territory. That was a question of national policy, properly reserved for the decision of those to whom the constitution had committed the power. The framers of the treaty well knew that the President and Senate could not bind Congress to admit new States into the Union. . . . If the President and Senate can, by treaty, change the Constitution of the United States, and rob Congress of a power clearly delegated, the doctrine may be true, but otherwise, it is false. The treaty, therefore, has no operation on the question in debate. Its requirements, however, have been faithfully fulfilled. In 1804, the laws of the United States were extended to that territory. The protection afforded by the Federal Constitution was guaranteed to its inhabitants. They were thus "incorporated in the Union," and secured in the enjoyment of their rights. The treaty stipulation being thus executed, "as soon as possible," it remained a question for the future determination of Congress, whether the Government should remain territorial or become that of an independent State. In 1811, this question was decided in relation to that part of the territory which then embraced nearly all the population, and to acquire which, alone, the treaty had been made. A law was passed to enable the people of the Territory of Orleans to form a constitution and State government, and to provide for its admission into the Union. Did Congress then doubt its power to annex conditions to such admission? No, sir, far from it. The government of Orleans had always been administered according to the principles of the civil law. The common law, so highly valued in other parts of our country, was not recognized there. Trial by jury was unknown to the inhabitants. Instead of a privilege, they considered its introduction an odious departure from their ancient administration of justice. Left to themselves, they never would have introduced it. Congress, however, knowing these things, made it a condition of their admission into the Union, that trial

by jury should be secured to the citizen by a constitutional provision.

Even the language of the Territory was required to be changed, as a condition of its admission. The inhabitants were wholly French and Spanish. Theirs were the only languages generally spoken, or even understood. But Congress required from them a constitutional provision, that their legislative and judicial proceedings should be conducted in the English language. They were not left at liberty to determine this point for themselves. From these facts, it appears that Congress, at that day, acted from a conviction that it possessed the power of prescribing the conditions of their admission into the Union. . . .

. . . The sovereignty of Congress in relation to the State, is limited by specific grants — but, in regard to the Territories, it is unlimited. Missouri was purchased with our money, and, until incorporated into the family of States, it may be sold for money. Can it then be maintained, that although we have the power to dispose of the whole Territory, we have no right to provide against the further increase of slavery within its limits? That, although we may change the political relations of its free citizens by transferring their country to a foreign power, we cannot provide for the gradual abolition of slavery within its limits, nor establish those civil regulations which naturally flow from self-evident truth? No, sir, it cannot; the practice of nations and the common sense of mankind have long since decided these questions.

92. *Representative McLane on the Admission of Missouri.*¹

Mr. Chairman, the great question involved in this amendment is neither more nor less than this: whether Congress can interfere with the people of Missouri, in the formation of their constitution, to compel them to introduce into it any provision, touching their municipal rights, against their consent, and to give up their right to change it, whatever may be their future condition, or that of their posterity? Every thing beyond this

¹ February 7, 1820. *Annals of Congress*, 16 Cong., 1 Sess., 1141-60 *passim*.

is merely the imposing garb in which the power comes recommended to us. It is certainly true, that an attempt to take from this people the right of deciding whether they will or will not tolerate slavery among them, is less objectionable because of its end, than it would be if it interfered with some other local relation or right of property; but the power to do this implies a power of much greater expansion. Congress has no greater power over slavery, or the rights of the owner, in any particular State, than it has over any other local relation or domestic right; and, therefore, a power to interfere with one must be derived from a power to interfere with all. . . .

The people of Missouri come here with the Treaty of 1803 in their hands; they demand admission into the Union as a matter of right — they do not solicit it as a favor. If their constitution is republican and consistent with the provisions of that under which we are acting, we have no alternative, unless it is to refuse to execute our own contract — to violate the plighted faith of the nation. . . .

They are to be incorporated into the Union of the United States, and are to be admitted as soon as possible to the enjoyment of the rights, advantages, and immunities, &c., and “in the mean time they are to be protected in the free enjoyment of their property.” This latter clause shows that their incorporation into the Union meant more than a Territorial form of government; they were to be under such a government until they could be incorporated into the Union, and during that time their property was not to be disturbed. It was only under that form of government that the United States could interfere with these rights. Their power would cease when it became possible to incorporate them into the Union, and admit them to the enjoyment of all the “rights, advantages, and immunities, of citizens of the United States;” in virtue of which, they would themselves be authorized to regulate their own property.

Now, Mr. Chairman, the people of Missouri cannot be incorporated into the Union but as the people of a “State,” exercising State government. It is a Union of States, not of the people, much less of Territories. A Territorial government

can form no integral part of a union of State governments; neither can the people of a Territory enjoy any federal rights, until they have formed a State government, and obtained admission into the Union. The most important of the federal advantages and immunities consist in the right of being represented in Congress — as well in the Senate as in this House — the right of participating in the councils by which they are governed. These are emphatically the “rights, advantages, and immunities, of citizens of the United States.” The inhabitant of a Territory merely has no such rights — he is not a citizen of the United States. He is in a state of disability, as it respects his political or civil rights. Can it be called a “right” to acquire and hold property, and have no voice by which its disposition is to be regulated? Can it be called an advantage or immunity of a citizen of the United States to be subjected to a Government in whose deliberations he had no share or agency, beyond the mere arbitrary pleasure of the governor — to be ruled by a power irresponsible (to him, at least) for its conduct? Sir, the rights, advantages, and immunities, of citizens of the United States, and which are their proudest boast, are the rights of self-government — first, in their State constitutions; and secondly, in the Government of the Union, in which they have an equal participation. . . .

. . . No little reliance has also been placed by the honorable mover, upon the clause in the constitution, vesting in Congress a power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States.

I do not propose to enter minutely into the inquiry whether the power of Congress to establish a territorial government is derived from this clause. I incline to the opinion that it is not. The power here conferred is a power to dispose of and make needful rules respecting the property of the United States. It was designed, I think, to authorize the sale of the land for purposes of revenue, and all regulations which might be deemed necessary for its proper disposition; or to convert it to other public objects disconnected with sale or revenue; to retain this

power, even after the Territory had assumed a State government, and perhaps to divest from the State government the right of taxing it, as it would do the property of individuals. It is silent as to the people, and their slaves are the property of their owners, and not of the Government. The right to govern a territory is clearly incident to the right of acquiring it. It would be absurd to say that any Government might purchase a territory with a population, and not have the power to give them laws; but, from whatever source the power is derivable, I admit it to be plenary, so long as it remains in a condition of territorial dependence, but no longer. I am willing at any time to exercise this power. I regret that it has not been done sooner. But, though Congress can give laws to a Territory, it cannot prescribe them to a State. The condition of the people of a Territory is to be governed by others; of a State to govern themselves. This is the great favor we permit them to enjoy when we exalt them to the character of a State. The instant we authorize them to form their constitution, the territorial disabilities, and the powers of Congress over them, crumble together in the dust. A new being, and a new relation spring up; the State authority, derived from the just power of the people, takes its place; every feature of the territorial authority becomes effaced, and the federal powers of Congress, encircling a State, commence their operation. There is nothing of territorial disability on the one hand, or territorial authority on the other, which passes into the new order of things; if they did, the State would be incomplete. . . .

93. *Senator Pinkney on the Admission of Missouri.*¹

"New States may be admitted by the Congress into this Union." It is objected that the word "may" imports power, not obligation — a right to decide — a discretion to grant or refuse.

To this it might be answered, that power is duty, on many occasions. But let it be conceded that it is discretionary. What

¹ February 15, 1820. *Annals of Congress*, 16 Cong., 1 Sess., 397-99 *passim*.

consequence follows? A power to refuse, in a case like this, does not necessarily involve a power to exact terms. You must look to the result, which is the declared object of the power. Whether you will arrive at it or not may depend on your will; but you cannot compromise with the result intended and professed.

What, then, is the professed result? To admit a State into this Union.

What is that Union? A confederation of States equal in sovereignty, capable of every thing which the constitution does not forbid, or authorize Congress to forbid. It is an equal Union between parties equally sovereign. They were sovereign, independently of the Union. The object of the Union was common protection for the exercise of already existing sovereignty. The parties gave up a portion of that sovereignty to insure the remainder. As far as they gave it up by the common compact they have ceased to be sovereign. The Union provides the means of defending the residue, and it is into that Union that a new State is to come. By acceding to it the new State is placed on the same footing with the original States. It accedes for the same purpose; that is, protection for its unsundered sovereignty. If it comes in shorn of its beams — crippled and disparaged beyond the original States — it is not into the original Union that it comes. For it is a different sort of Union. The first was Union *inter pares*: this is a Union between *disparates*, between giants and a dwarf, between power and feebleness, between full proportioned sovereignties and a miserable image of power — a thing which that very Union has shrunk and shrivelled from its just size, instead of preserving it in its true dimensions. . . .

It is into "this Union" — that is, the Union of the Federal Constitution — that you are to admit or refuse to admit. You can admit into no other. You cannot make the Union, as to the new State, what it is not as to the old; for then it is not *this Union* that you open for the entrance of a new party. If you make it enter into a new and additional compact, is it any longer the same Union? . . .

But it is a *State* which you are to admit. What is a State in the sense of the constitution? It is not a State in the general, but a State as you find in the constitution. A State, generally, is a body politic or independent political society of men. But the State which you are to admit must be more or less than this political entity. What must it be? Ask the constitution. It shows what it means by a State by reference to the parties to it. It must be such a State as Massachusetts, Virginia, and the other members of the American confederacy — a State with full sovereignty, except as the constitution restricts it. . . .

In a word, the whole amount of the argument on the other side is, that you may refuse to admit a new State, and that therefore if you admit, you may prescribe the terms.

The answer to that argument is, that even if you can refuse, you can prescribe no terms which are inconsistent with the act you are to do. You can prescribe no conditions which, if carried into effect, would make the new State less a sovereign State than, under the Union as it stands, it would be. You can prescribe no terms which will make the compact of Union between it and the original States essentially different from that compact among the original States. . . .

CHAPTER XXXIV

NULLIFICATION IN GEORGIA

THE presence of the Creek and Cherokee Indians within the territorial limits of Georgia, and occupying some of the best lands, was a source of constant irritation to the people of that State. Vexed at the delay of the National Government in securing the removal of the Creeks, the State authorities took steps to survey and occupy their lands. President Adams warned them to desist, intimating that the Federal Government was prepared to use force to defend the Indian claims. The Governor returned a defiant answer and called out the militia; and the legislature indorsed his course. Fortunately further trouble was avoided by a treaty (1827), which provided for the removal of the Creeks. Meantime, the Cherokee Nation had framed a constitution as though to form a State within the State. The legislature at once took steps to assert its jurisdiction over the Indian lands. Vigorous resolutions again were adopted and acts were passed incorporating the lands within five counties. Subsequently, a Cherokee by the name of George Tassels was tried and convicted of murder by the State courts. Deeming this a proper occasion for asserting the authority of the federal judiciary, Chief Justice Marshall sanctioned a writ of error citing the State authorities to appear before the Supreme Court. Thereupon the legislature passed the following resolutions, and completed its defiance by putting Tassels to death. In the meantime, the Cherokee Nation had sought an injunction from the Supreme Court to restrain the State of Georgia from extending her jurisdiction over their lands. In this purpose they were thwarted (*Cherokee Nation v. State of Georgia*). But when certain missionaries to the Cherokees were arrested and sentenced to imprisonment, for not complying with the law which required white persons to take out a license to reside within the Indian lands, the case was taken before the Supreme Court on writ of error and the following opinion rendered (*Worcester v. Georgia*). The authorities of Georgia, however, would not recognize the judgment of the Court, nor release Worcester and his fellow missionaries; and President Jackson declined to sustain the Court.

94. *Georgia and the Lands of the Creeks and Cherokees.*¹

Resolved, That all the lands appropriated and unappropriated, which lie within the conventional limits of Georgia, belong to her absolutely; that the title is in her; that the Indians are tenants at her will; that she may, at any time she

¹ Resolution of the Legislature of Georgia. *Acts of Georgia*, 1827, 248.

pleases, determine that tenancy by taking possession of the premises; and that Georgia has the right to extend her authority and laws over the whole territory, and to coerce obedience to them, from all description of people, be they white, red, or black, who reside within her limits.

95. *The Legislature of Georgia on the Case of George Tassels.*¹

Whereas, it appears by a communication, made by his Excellency the Governor, to this General Assembly, that the Chief Justice of the Supreme Court of the United States, has sanctioned a writ of error, and cited the State of Georgia, through her chief Magistrate, to appear before the Supreme Court of the United States to defend this State against said writ of error, at the instance of one George Tassels, recently convicted in Hall county, Superior Court, of the crime of murder. And whereas, the right to punish crimes, against the peace and good order of this state, in accordance with existing laws is an original and a necessary part of sovereignty which the State of Georgia has never parted with.

Be it therefore resolved by the Senate, and House of Representatives of the State of Georgia, in General Assembly met, That they view with feelings of the deepest regret, the interference by the Chief Justice of the Supreme Court of the United States, in the Administration of the criminal laws of this state, and that such an interference is a flagrant violation of her rights.

Resolved further, That his Excellency the Governor, be and he, and every officer of this State, is hereby requested and enjoined, to disregard any and every mandate and process that has been, or shall be served upon him or them, purporting to proceed from the Chief Justice, or any associate Justice of the Supreme Court of the United States, for the purpose of arresting the execution of any of the criminal laws of this State.

And be it further resolved, That his Excellency the Governor, be and he is hereby authorized and required, with all the force and means, placed at his command, by the Constitution and

¹ Resolutions of the Legislature, December 22, 1830. *Acts of Georgia*, 1830, 282.

laws of this State, to resist and repel, any and every invasion, from whatever quarter, upon the administration of the criminal laws of this State.

Resolved, That the State of Georgia will never so far compromise her sovereignty as an independent State, as to become a party to the case sought to be made before the Supreme Court of the United States, by the writ in question.

Resolved, That his Excellency the Governor, be and he is hereby, authorized, to communicate to the Sheriff of Hall county by express, so much of the foregoing resolutions, and such order, as are necessary to insure the full execution of the laws, in the case of George Tassels, convicted of murder in Hall county.

96. *The Cherokee Nation v. The State of Georgia.*¹

Mr. Chief Justice Marshall delivered the opinion of the Court:

. . . Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause? . . .

Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution? . . .

Though the Indians are acknowledged to have an unquestionable and, therefore, unquestioned right to the land they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants;

¹ Supreme Court of the United States, 1831. 5 Peters, 1.

and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the Union to controversies between a State or the citizens thereof and foreign states. . . .

Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term foreign state, were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the 8th section of the 1st article, which empowers Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several States composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes — foreign nations, the several States, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption. . . .

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a for-

eign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States.

97. *Worcester v. The State of Georgia.*¹

Mr. Chief Justice Marshall delivered the opinion of the Court:

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.

Is this the rightful exercise of power, or is it usurpation?

While these States were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, Congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all: Congress, therefore, was considered as invested with all the powers of war and peace, and Congress dissolved our connection with the mother country, and declared these united colonies to be independent States. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, Congress assumed the management of Indian affairs; first in the name of these united colonies; and, afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States, and the efforts to make peace, by treaty,

¹ Supreme Court of the United States, 1832. 6 Peters, 515.

were earnest and incessant. The confederation found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to Congress, and prohibited them to the States, respectively, unless a State be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in Congress assembled can be consulted." This instrument also gave the United States in Congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided, that the legislative power of any State within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the States of North Carolina and Georgia as to annul the power itself. . . . The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally

applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties; that, within their boundary, they possessed rights with which no State could interfere; and that the whole power of regulating the intercourse with them, was vested in the United States. . . .

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

The act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. Can this court revise and reverse it?

If the objection to the system of legislation, lately adopted by the legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia, guarantee to them all the land within their boundary, solemnly pledge the faith of the United States to restrain their citizens from trespassing on it, and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the President of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guaranteeing the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the Union, those duties which the humane policy adopted by Congress had recommended. He was apprehended, tried, and condemned, under color of a law which has been shown to be repugnant to the constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for

property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the constitution, laws, and treaties of his country.

This point has been elaborately argued and, after deliberate consideration, decided, in the case of *Cohens v. The Commonwealth of Virginia*, 6 Wheat., 264.

It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the State of Georgia, condemning Samuel A. Worcester to hard labor, in the penitentiary of the State of Georgia, for four years, was pronounced by that court under color of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.

CHAPTER XXXV

THE DOCTRINE OF NULLIFICATION

THE theory of nullification associated with the name of John C. Calhoun was first set forth in a report which he drafted for a committee of the legislature of South Carolina. Adopted by the legislature with some modifications on December 19, 1828, this report became widely known as the "South Carolina Exposition." Between this date and 1832, Calhoun elaborated his doctrine in various letters and addresses. It was Calhoun who gave final form to the State-Rights doctrine. In contrast to the current view, he held that sovereignty could not be divided; that the States were originally sovereign; and that the general Government was merely the agent of the sovereign States.

98. *The South Carolina Exposition.*¹

. . . In order to have a full and clear conception of our institutions, it will be proper to remark that there is, in our system, a striking distinction between Government and Sovereignty. The separate governments of the several States are vested in their Legislative, Executive, and Judicial Departments; while the sovereignty resides in the people of the States respectively. The powers of the General Government are also vested in its Legislative, Executive, and Judicial Departments, while the sovereignty resides in the people of the several States who created it. But, by an express provision of the Constitution, it may be amended or changed by three fourths of the States; and thus each State, by assenting to the Constitution with this provision, has modified its original right as a sovereign, of making its individual consent necessary to any change in its political condition; and, by becoming a member of the Union, has placed this important power in the hands of three fourths of the States, — in whom the highest power known to the Constitution actually resides. Not the least portion of this high sovereign authority resides in Congress, or any of the

¹ *Works of John C. Calhoun* (Crallé ed.), vi, 36-51 *passim*. Adopted by the Legislature of South Carolina in December, 1828.

departments of the General Government. They are but the creatures of the Constitution, and are appointed but to execute its provisions; and, therefore, any attempt by all, or any of these departments, to exercise any power which, in its consequences, may alter the nature of the instrument, or change the condition of the parties to it, would be an act of usurpation. . . .

If we look to the history and practical operation of the system, we shall find, on the side of the States, no means resorted to in order to protect their reserved rights against the encroachments of the General Government; while the latter has, from the beginning, adopted the most efficient to prevent the States from encroaching on those delegated to them. The 25th section of the Judiciary Act, passed in 1789, — immediately after the Constitution went into operation, — provides for an appeal from the State courts to the Supreme Court of the United States in all cases, in the decision of which, the construction of the Constitution, — the laws of Congress, or treaties of the United States may be involved; thus giving to that high tribunal the right of final interpretation, and the power, in reality, of nullifying the acts of the State Legislatures whenever, in their opinion, they may conflict with the powers delegated to the General Government. A more ample and complete protection against the encroachments of the governments of the several States cannot be imagined; and to this extent the power may be considered as indispensable and constitutional. But, by a strange misconception of the nature of our system, — and, in fact, of the nature of government, — it has been regarded as the ultimate power, not only of protecting the General Government against the encroachments of the governments of the States, but also of the encroachments of the former on the latter; — and as being, in fact, the only means provided by the Constitution of confining all the powers of the system to their proper constitutional spheres; and, consequently, of determining the limits assigned to each. Such a construction of its powers would, in fact, raise one of the departments of the General Government above the parties who created the con-

stitutional compact, and virtually invest it with the authority to alter, at its pleasure, the relative powers of the General and State Governments, on the distribution of which, as established by the Constitution, our whole system rests; — and which, by an express provision of the instrument, can only be altered by three fourths of the States, as has already been shown. . . .

As a substitute for the rightful remedy, in the last resort, against the encroachments of the General Government on the reserved powers, resort has been had to a rigid construction of the Constitution. A system like ours, of divided powers, must necessarily give great importance to a proper system of construction; but it is perfectly clear that no rule of construction, however perfect, can, in fact, prescribe bounds to the operation of power. . . . In fact, the power of construction, on which its advocates relied to preserve the rights of the States, has been wielded, as it ever must be, if not checked, to destroy those rights. If the minority has a right to prescribe its rule of construction, a majority, on its part, will exercise a similar right; but with this striking difference, — that the right of the former will be a mere nullity against that of the latter. But that protection, which the minor interests must ever fail to find in any technical system of construction, may be found in the reserved rights of the States themselves, if they be properly called into action; and there only will they ever be found of sufficient efficacy. . . .

If it be conceded, as it must be by every one who is the least conversant with our institutions, that the sovereign powers delegated are divided between the General and State Governments, and that the latter hold their portion by the same tenure as the former, it would seem impossible to deny to the States the right of deciding on the infractions of their powers, and the proper remedy to be applied for their correction. The right of judging, in such cases, is an essential attribute of sovereignty, — of which the States cannot be divested without losing their sovereignty itself, — and being reduced to a subordinate corporate condition. In fact, to divide power, and to give to one of the parties the exclusive right of judging of the portion

allotted to each, is, in reality, not to divide it at all; and to reserve such exclusive right to the General Government (it matters not by what department to be exercised), is to convert it, in fact, into a great consolidated government, with unlimited powers, and to divest the States, in reality, of all their rights. It is impossible to understand the force of terms, and to deny so plain a conclusion. The opposite opinion can be embraced only on hasty and imperfect views of the relation existing between the States and the General Government. But the existence of the right of judging of their powers, so clearly established from the sovereignty of States, as clearly implies a veto or control, within its limits, on the action of the General Government, on contested points of authority; and this very control is the remedy which the Constitution has provided to prevent the encroachments of the General Government on the reserved rights of the States; and by which the distribution of power, between the General and State Governments, may be preserved for ever inviolable, on the basis established by the Constitution. It is thus effectual protection is afforded to the minority, against the oppression of the majority. . . .

. . . How is the remedy to be applied by the States? In this inquiry a question may be made, — whether a State can interpose its sovereignty through the ordinary Legislature, but which the committee do not deem it necessary to investigate.

. . . Whatever doubts may be raised as to the question, — whether the respective legislatures fully represent the sovereignty of the States for this high purpose, there can be none as to the fact that a Convention fully represents them for all purposes whatever. Its authority, therefore, must remove every objection as to form, and leave the question on the single point of the right of the States to interpose at all. When convened, it will belong to the Convention itself to determine, authoritatively, whether the acts of which we complain be unconstitutional; and, if so, whether they constitute a violation so deliberate, palpable, and dangerous, as to justify the interposition of the State to protect its rights. If this question be decided in the affirmative, the Convention will then determine

in what manner they ought to be declared null and void within the limits of the State; which solemn declaration, based on her rights as a member of the Union, would be obligatory, not only on her own citizens, but on the General Government itself; and thus place the violated rights of the State under the shield of the Constitution. . . .

. . . As high as this right of interposition on the part of a State may be regarded in relation to the General Government, the constitutional compact provides a remedy against its abuse. There is a higher power, — placed above all by the consent of all, — the creating and preserving power of the system, — to be exercised by three fourths of the States, — and which, under the character of the amending power, can modify the whole system at pleasure, — and to the acts of which none can object. Admit, then, the power in question to belong to the States, — and admit its liability to abuse, — and what are the utmost consequences, but to create a presumption against the constitutionality of the power exercised by the General Government, — which, if it be well founded, must compel them to abandon it; — or, if not, to remove the difficulty by obtaining the contested power in the form of an amendment to the Constitution. If, on an appeal for this purpose, the decision be favorable to the General Government, a disputed power will be converted into an expressly granted power; — but, on the other hand, if it be adverse, the refusal to grant will be tantamount to an inhibition of its exercise: and thus, in either case, the controversy will be determined. And ought not a sovereign State, as a party to the constitutional compact, and as the guardian of her citizens and her peculiar interests, to have the power in question? Without it, the amending power must become obsolete, and the Constitution, through the exercise of construction, in the end utterly subverted. Let us examine the case. The disease is, that a majority of the States, through the General Government, by construction, usurp powers not delegated, and by their exercise, increase their wealth and authority at the expense of the minority. How absurd, then, to expect the injured States to attempt a remedy by proposing an amendment

to be ratified by three fourths of the States, when, by supposition, there is a majority opposed to them! Nor would it be less absurd to expect the General Government to propose amendments, unless compelled to that course by the acts of a State. The Government can have no inducement. It has a more summary mode, — the assumption of power by construction. The consequence is clear: — neither would resort to the amending power; — the one, because it would be useless, — and the other, because it could effect its purpose without it; — and thus the highest power known to the Constitution, — on the salutary influence of which, on the operations of our political institutions, so much was calculated, would become, in practice, obsolete, as stated; and in lieu of it, the will of the majority, under the agency of construction, would be substituted, with unlimited and supreme power. On the contrary, giving the right to a State to compel the General Government to abandon its pretensions to a constructive power, or to obtain a positive grant of it, by an amendment to the Constitution, would call efficiently into action, on all important disputed questions, this highest power of the system, — to whose controlling authority no one can object, and under whose operation all controversies between the States and General Government would be adjusted, and the Constitution gradually acquire all the perfection of which it is susceptible. It is thus that the *creating* becomes the *preserving* power; and we may rest assured it is no less true in politics than in theology, that the power which creates can alone preserve, — and that preservation is perpetual creation. Such will be the operation and effect of State interposition. . . .

99. *Report for a Committee of the South Carolina Legislature.*¹

The General Government, properly considered, is but a great political association, in which the States, as parties to the contract that formed it, are *partners*, and the Government the *direction*. Among the leading and essential provisions of the contract are, — that no powers should be granted to the asso-

¹ November, 1831. *Works of Calhoun* (Crallé ed.), VI, 111-12.

ciation, or exercised by the *direction*, except such as have been assented to by three fourths of all the *partners*, and that the *compact*, forming the association, shall not be changed or altered but by a proportional number of the partners; but that the powers granted, with a few specified exceptions, should be exercised by a majority of the direction, appointed by a majority of the partners; thus subjecting the two to a very different control; in the former, the will of the majority prevails, — while in the latter, the consent of three fourths of the partners is required.

Thus organized, it is impossible not to see, that the interest which controls in the direction, must come into conflict with that which prevails with the partners or stockholders; and that, unless there be, on the part of the latter, a right to compel the former to submit all questions touching the compact of association, to the stockholders themselves, according to the provision of the contract, the interests of the direction would absorb those of the stockholders, — the *By-Laws* would prevail over the *Charter*; — and we accordingly find, in all private associations, such a right universally recognized, as essential to protect the rights and interests of the stockholders, against those of the direction. But as essential as this is in all such associations, it is far more so in our great Political Joint-Stock Association, — comprehending, as it does, powers that may touch the labor and capital of the whole community; and when, of course, the motives to encroachment are infinitely stronger than they can be in any case of private association. . . .

100. *The Fort Hill Letter on State Interposition.*¹

. . . From the beginning, and in all the changes of political existence through which we have passed, the people of the United States have been united as forming political communities, and not as individuals. Even in the first stage of existence, they formed distinct colonies, independent of each other, and politically united only through the British crown. In their

¹ Calhoun to General Hamilton, August 28, 1832. *Works of Calhoun* (Crallé ed.), VI, 147-69 *passim*.

first imperfect union, for the purpose of resisting the encroachments of the mother country, they united as distinct political communities; and passing from their colonial condition, in the act announcing their independence to the world, they declared themselves, by name and enumeration, free and independent States. In that character, they formed the old confederation; and, when it was proposed to supersede the articles of the confederation by the present Constitution, they met in convention as States, acted and voted as States; and the Constitution, when formed, was submitted for ratification to the people of the several States; it was ratified by them as States, each State for itself; each by its ratification binding its own citizens: the parts thus separately binding themselves, and not the whole the parts; to which, if it be added, that it is declared in the preamble of the Constitution to be ordained by the people of the *United States*, and in the article of ratification, when ratified, it is declared "*to be binding between the States so ratifying*," the conclusion is inevitable, that the Constitution is the work of the people of the States, considered as separate and independent political communities; that they are its authors — their power created it, their voice clothed it with authority; that the government formed is, in reality, their agent; and that the Union, of which the Constitution is the bond, is a union of States, and not of individuals. . . .

First, they [Secession and Nullification] are wholly dissimilar in their nature. *One has reference to the parties themselves, and the other to their agents.* Secession is a *withdrawal from the Union*; a separation from *partners*, and, as far as depends on the member withdrawing, a *dissolution* of the partnership. It presupposes an association; a union of several States or individuals for a common object. Wherever these exist, secession may; and where they do not, it cannot. Nullification, on the contrary, *presupposes the relation of principal and agent*: the one granting a power to be executed, — the other, appointed by him with authority to execute it; *and is simply a declaration on the part of the principal, made in due form, that an act of the agent transcending his power is null and void.* It is a right belonging exclu-

sively to the relation between principal and agent, to be found *wherever it exists, and in all its forms*, between several, or an association of principals, and their joint agents, as well as between a single principal and his agent.

The difference in their object is no less striking than in their nature. The object of secession is to *free* the withdrawing member from the obligation of the association or union, and is applicable to cases where the object of the association or union has *failed*, either by an abuse of power on the part of *its members*, or other causes. Its *direct and immediate object, as it concerns the withdrawing member, is the dissolution of the association or union*, as far as it is concerned. On the contrary, the object of nullification is to confine the agent within the limits of his powers, by arresting his acts transcending them, *not with the view of destroying the delegated or trust power, but to preserve it, by compelling the agent to fulfil the object for which the agency or trust was created; and is applicable only to cases where the trust or delegated powers are transcended on the part of the agent. . . .*

CHAPTER XXXVI

NULLIFICATION IN SOUTH CAROLINA

By the year 1832 the people of South Carolina were prepared to put the doctrine of nullification to a practical test. The preliminary steps in the process conformed to Calhoun's views. The ordinance not only declared the various tariff acts null and void, but pointed out to the legislature how it should prevent the collection of duties. In measuring the success of nullification as a constitutional remedy, many considerations — which cannot be easily illustrated by selected documents — must be taken into account. The legislature of South Carolina met the demands of the convention by passing the Replevin and other acts. Over against these measures, however, must be set President Jackson's arraignment of the ordinance, the uninterrupted collection of duties in South Carolina, and the Force Act. South Carolina could point, to be sure, to the lower duties of the compromise tariff of 1833 as evidence that nullification had accomplished its purpose, and to its ordinance nullifying the Force Act as evidence that nullification had not been abandoned as a remedy. On the other hand, no State sustained the position of South Carolina, and the Force Act remained on the statute books of the United States — a silent reminder that the Government at Washington had not recognized nullification as a constitutional remedy.

101. *South Carolina Ordinance of Nullification.*¹

Whereas the Congress of the United States, by various acts, purporting to be acts laying duties and imposts on foreign imports, but in reality intended for the protection of domestic manufactures, and the giving of bounties to classes and individuals engaged in particular employments, at the expense and to the injury and oppression of other classes and individuals, and by wholly exempting from taxation certain foreign commodities, such as are not produced or manufactured in the United States, to afford a pretext for imposing higher and excessive duties on articles similar to those intended to be protected, hath exceeded its just powers under the Constitution, which confers on it no authority to afford such protection, and hath violated the true meaning and intent of the Consti-

¹ November 24, 1832. *Senate Documents*, No. 30, 22 Cong., 2 Sess., 36-38.

tution, which provides for equality in imposing the burthens of taxation upon the several States and portions of the confederacy: And whereas the said Congress, exceeding its just power to impose taxes and collect revenue for the purpose of effecting and accomplishing the specific objects and purposes which the Constitution of the United States authorizes it to effect and accomplish, hath raised and collected unnecessary revenue for objects unauthorized by the Constitution:

We, therefore, the people of the State of South Carolina in Convention assembled, do declare and ordain, and it is hereby declared and ordained, that the several acts and parts of acts of the Congress of the United States, purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities, and now having actual operation and effect within the United States, and, more especially, an act entitled "An act in alteration of the several acts imposing duties on imports," approved on the nineteenth day of May, one thousand eight hundred and twenty-eight, and also an act entitled "An act to alter and amend the several acts imposing duties on imports," approved on the fourteenth day of July, one thousand eight hundred and thirty-two, are unauthorized by the Constitution of the United States, and violate the true meaning and intent thereof, and are null, void, and no law, nor binding upon this State, its officers or citizens; and all promises, contracts, and obligations, made or entered into, or to be made or entered into, with purpose to secure the duties imposed by the said acts, and all judicial proceedings which shall be hereafter had in affirmance thereof, are and shall be held utterly null and void.

And it is further ordained, that it shall not be lawful for any of the constituted authorities, whether of this State or of the United States, to enforce the payment of duties imposed by the said acts within the limits of this State; but it shall be the duty of the Legislature to adopt such measures and pass such acts as may be necessary to give full effect to this ordinance, and to prevent the enforcement and arrest the operation of the said acts and parts of acts of the Congress of the United States

within the limits of this State, from and after the 1st day of February next, and the duty of all other constituted authorities, and of all persons residing or being within the limits of this State, and they are hereby required and enjoined, to obey and give effect to this ordinance, and such acts and measures of the Legislature as may be passed or adopted in obedience thereto.

And it is further ordained, that in no case of law or equity, decided in the courts of this State, wherein shall be drawn in question the authority of this ordinance, or the validity of such act or acts of the Legislature as may be passed for the purpose of giving effect thereto, or the validity of the aforesaid acts of Congress, imposing duties, shall any appeal be taken or allowed to the Supreme Court of the United States, nor shall any copy of the record be permitted or allowed for that purpose; and if any such appeal shall be attempted to be taken, the courts of this State shall proceed to execute and enforce their judgments, according to the laws and usages of the State, without reference to such attempted appeal, and the person or persons attempting to take such appeal may be dealt with as for a contempt of the court.

And it is further ordained, that all persons now [now] holding any office of honor, profit, or trust, civil or military, under this State, (members of the Legislature excepted,) shall, within such time, and in such manner as the Legislature shall prescribe, take an oath well and truly to obey, execute and enforce, this ordinance, and such act or acts of the Legislature as may be passed in pursuance thereof, according to the true intent and meaning of the same; and on the neglect or omission of any such person or persons so to do, his or their office or offices shall be forthwith vacated, and shall be filled up as if such person or persons were dead or had resigned; and no person hereafter elected to any office of honor, profit, or trust, civil or military, (members of the Legislature excepted,) shall, until the Legislature shall otherwise provide and direct, enter on the execution of his office, or be in any respect competent to discharge the duties thereof, until he shall, in like manner, have taken a similar oath; and no juror shall be empanelled in any of the

courts of this State, in any cause in which shall be in question this ordinance, or any act of the Legislature passed in pursuance thereof, unless he shall first, in addition to the usual oath, have taken an oath that he will well and truly obey, execute, and enforce this ordinance, and such act or acts of the Legislature as may be passed to carry the same into operation and effect, according to the true intent and meaning thereof.

And we, the people of South Carolina, to the end that it may be fully understood by the Government of the United States, and the people of the co-States, that we are determined to maintain this, our ordinance and declaration, at every hazard, do further declare that we will not submit to the application of force, on the part of the Federal Government, to reduce this State to obedience; but that we will consider the passage, by Congress, of any act authorizing the employment of a military or naval force against the State of South Carolina, her constituted authorities or citizens; or any act abolishing or closing the ports of this State, or any of them, or otherwise obstructing the free ingress and egress of vessels to and from the said ports, or any other act on the part of the Federal Government, to coerce the State, shut up her ports, destroy or harrass her commerce, or to enforce the acts hereby declared to be null and void, otherwise than through the civil tribunals of the country, as inconsistent with the longer continuance of South Carolina in the Union: and that the people of this State will thenceforth hold themselves absolved from all further obligation to maintain or preserve their political connexion with the people of the other States, and will forthwith proceed to organize a separate Government, and do all other acts and things which sovereign and independent States may of right do.

102. *President Jackson's Proclamation to the People of South Carolina.*¹

The ordinance is founded, not on the indefeasible right of resisting acts which are plainly unconstitutional, and too

¹ December 10, 1832. Richardson, *Messages and Papers of the Presidents*, II, 641-52 *passim*.

oppressive to be endured; but on the strange position that any one State may not only declare an act of Congress void, but prohibit its execution — that they may do this consistently with the Constitution — that the true construction of that instrument permits a State to retain its place in the Union, and yet be bound by no other of its laws than those it may choose to consider as constitutional. It is true, they add, that to justify this abrogation of a law, it must be palpably contrary to the Constitution; but it is evident, that, to give the right of resisting laws of that description, coupled with the uncontrolled right to decide what laws deserve that character, is to give the power of resisting all laws. For, as by the theory, there is no appeal, the reasons alleged by the State, good or bad, must prevail. If it should be said that public opinion is a sufficient check against the abuse of this power, it may be asked why it is not deemed a sufficient guard against the passage of an unconstitutional act by Congress? There is, however, a restraint in this last case, which makes the assumed power of a State more indefensible, and which does not exist in the other. There are two appeals from an unconstitutional act passed by Congress — one to the Judiciary, the other to the people, and the States. There is no appeal from the State decision in theory, and the practical illustration shows that the courts are closed against an application to review it, both judges and jurors being sworn to decide in its favor. But reasoning on this subject is superfluous, when our social compact, in express terms, declares that the laws of the United States, its Constitution, and treaties made under it, are the supreme law of the land; and, for greater caution, adds “that the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” And it may be asserted without fear of refutation, that no Federative Government could exist without a similar provision. Look for a moment to the consequence. If South Carolina considers the revenue laws unconstitutional, and has a right to prevent their execution in the port of Charleston, there would be a clear constitutional objection to their collection in every other port, and no revenue could be

collected anywhere; for all imposts must be equal. It is no answer to repeat, that an unconstitutional law is no law, so long as the question of its legality is to be decided by the State itself; for every law operating injuriously upon any local interest will be perhaps thought, and certainly represented, as unconstitutional, and, as has been shown, there is no appeal. . . .

I consider, then, the power to annul a law of the United States, assumed by one State, **INCOMPATIBLE WITH THE EXISTENCE OF THE UNION, CONTRADICTED EXPRESSLY BY THE LETTER OF THE CONSTITUTION, UNAUTHORIZED BY ITS SPIRIT, INCONSISTENT WITH EVERY PRINCIPLE ON WHICH IT WAS FOUNDED, AND DESTRUCTIVE OF THE GREAT OBJECT FOR WHICH IT WAS FORMED.**

After this general view of the leading principle, we must examine the particular application of it which is made in the ordinance.

The preamble rests its justification on these grounds: It assumes, as a fact, that the obnoxious laws, although they purport to be laws for raising revenue, were in reality intended for the protection of manufactures, which purpose it asserts to be unconstitutional; that the operation of these laws is unequal; that the amount raised by them is greater than is required by the wants of the Government; and, finally, that the proceeds are to be applied to objects unauthorized by the Constitution. These are the only causes alleged to justify an open opposition to the laws of the country, and a threat of seceding from the Union, if any attempt should be made to enforce them. The first virtually acknowledges that the law in question was passed under a power expressly given by the Constitution to lay and collect imposts; but its constitutionality is drawn in question from the *motives* of those who passed it. However apparent this purpose may be in the present case, nothing can be more dangerous than to admit the position that an unconstitutional purpose, entertained by the members who assent to a law enacted under a constitutional power, shall make that law void: for how is that purpose to be ascertained? Who is to make the scrutiny? How often may bad purposes be

falsely imputed — in how many cases are they concealed by false professions — in how many is no declaration of motive made? Admit this doctrine, and you give to the States an uncontrolled right to decide, and every law may be annulled under this pretext. If, therefore, the absurd and dangerous doctrine should be admitted, that a State may annul an unconstitutional law, or one that it deems such, it will not apply to the present case.

The next objection is, that the laws in question operate unequally. This objection may be made with truth, to every law that has been or can be passed. The wisdom of man never yet contrived a system of taxation that would operate with perfect equality. If the unequal operation of a law makes it unconstitutional, and if all laws of that description may be abrogated by any State for that cause, then indeed is the Federal Constitution unworthy of the slightest effort for its preservation. . . .

The two remaining objections made by the ordinance to these laws, are that the sums intended to be raised by them are greater than are required, and that the proceeds will be unconstitutionally employed.

The Constitution has given, expressly, to Congress the right of raising revenue, and of determining the sum the public exigencies will require. The States have no control over the exercise of this right other than that which results from the power of changing the representatives who abuse it, and thus procure redress. Congress may, undoubtedly, abuse this discretionary power, but the same may be said of others with which they are vested. Yet the discretion must exist somewhere. The Constitution has given it to the representatives of all the people, checked by the representatives of the States, and by the Executive Power. The South Carolina constitution gives it to the Legislature or the Convention of a single State, where neither the people of the different States, nor the States in their separate capacity, nor the Chief Magistrate elected by the people, have any representation. Which is the most discreet disposition of the power? . . .

These are the alternatives that are presented by the Con-

vention: a repeal of all the acts for raising revenue, leaving the Government without the means of support, or an acquiescence in the dissolution of our Union by the secession of one of its members. When the first was proposed, it was known that it could not be listened to for a moment. It was known, if force was applied to oppose the execution of the laws that it must be repelled by force; that Congress could not, without involving itself in disgrace and the country in ruin, accede to the proposition: and yet if this is not done in a given day, or if any attempt is made to execute the laws, the State is, by the ordinance, declared to be out of the Union. The majority of a Convention assembled for the purpose, have dictated these terms, or rather this rejection of all terms, in the name of the people of South Carolina. It is true that the Governor of the State speaks of the submission of their grievances to a Convention of all the States, which, he says, they "sincerely and anxiously seek and desire." Yet this obvious and constitutional mode of obtaining the sense of the other States on the construction of the federal compact, and amending it, if necessary, has never been attempted by those who have urged the State on to this destructive measure. The State might have proposed the call for a General Convention to the other States; and Congress, if a sufficient number of them concurred, must have called it. But the first magistrate of South Carolina, when he expressed a hope that, "on a review by Congress and the functionaries of the General Government, of the merits of the controversy," such a Convention will be accorded to them, must have known that neither Congress, nor any functionary of the General Government, has authority to call such a Convention, unless it be demanded by two-thirds of the States. This suggestion, then, is another instance of the reckless inattention to the provisions of the Constitution with which this crisis has been madly hurried on; or of the attempt to persuade the people that a constitutional remedy had been sought and refused. If the Legislature of South Carolina "anxiously desire" a General Convention to consider their complaints, why have they not made application for it in the way the Constitution points out?

The assertion that they "earnestly seek it" is completely negatived by the omission.

This, then, is the position in which we stand. A small majority of the citizens of one State in the Union have elected delegates to a State Convention; that Convention has ordained that all the revenue laws of the United States must be repealed, or that they are no longer a member of the Union. The Governor of that State has recommended to the Legislature the raising of an army to carry the secession into effect, and that he may be empowered to give clearances to vessels in the name of the State. No act of violent opposition to the laws has yet been committed, but such a state of things is hourly apprehended; and it is the intent of this instrument to proclaim, not only that the duty imposed on me by the Constitution "to take care that the laws be faithfully executed," shall be performed to the extent of the powers already vested in me by law, or of such others as the wisdom of Congress shall devise and entrust to me for that purpose, but to warn the citizens of South Carolina who have been deluded into an opposition to the laws, of the danger they will incur by obedience to the illegal and disorganizing ordinance of the Convention; to exhort those who have refused to support it to persevere in their determination to uphold the Constitution and laws of their country; and to point out to all the perilous situation into which the good people of that State have been led, and that the course they are urged to pursue is one of ruin and disgrace to the very State whose rights they affect to support. . . .

CHAPTER XXXVII

THE NATURE OF THE UNION .

DOWN to the time of Calhoun, it was commonly held that the Union had been formed by an agreement or compact to which the States were parties. When the Constitution was framed, sovereignty was divided. As the Supreme Court said in *Chisholm v. Georgia*, "The United States are sovereign as to all the powers of government actually surrendered. Each State in the Union is sovereign as to the powers reserved." In his proclamation to the people of South Carolina, President Jackson combated nullification on the ground that the Union was a binding compact. The foremost defender of the nationalist theory of the Union was Daniel Webster. In his famous reply to Hayne in the Senate, January 26 and 27, 1830, he repudiated the current compact theory. He contended that the Union was established by the people of the United States just as a State constitution is formed by an agreement between individuals. "When the people agree to erect a government and actually erect it, the thing is done, and the agreement is at an end. The compact is executed, and the end designed by it is attained." From Webster's point of view, the Constitution is not a contract, but a supreme law ordained and established by the people of the United States. The Union is "the association of the people under a constitution of government, uniting their highest interests, cementing their present enjoyments, and blending in an indivisible mass all their hopes for the future."

103. *The Federal Compact a Binding Obligation.*¹

The Constitution of the United States then forms a *government*, not a league; and whether it be formed by compact between the States, or in any other manner, its character is the same. It is a government in which all the people are represented, which operates directly on the people individually, not upon the States — they retained all the power they did not grant. But each State having expressly parted with so many powers as to constitute, jointly with the other States, a single nation, cannot, from that period, possess any right to secede, because such secession does not break a league, but destroys

¹ Proclamation of President Jackson to the People of South Carolina, December 10, 1832. Richardson, *Messages and Papers of the Presidents*, II, 648-50 *passim*.

the unity of a nation; and any injury to that unity is not only a breach which would result from the contravention of a compact, but it is an offence against the whole Union. To say that any State may at pleasure secede from the Union, is to say that the United States are not a nation, because it would be a solecism to contend that any part of a nation might dissolve its connexion with the other parts, to their injury or ruin, without committing any offence. Secession, like any other revolutionary act, may be morally justified by the extremity of oppression; but to call it a constitutional right, is confounding the meaning of terms; and can only be done through gross error, or to deceive those who are willing to assert a right, but would pause before they made a revolution, or incur the penalties consequent on a failure.

Because the Union was formed by compact, it is said the parties to that compact may, when they feel themselves aggrieved, depart from it: but it is precisely because it is a compact that they cannot. A compact is an agreement or binding obligation. It may by its terms have a sanction or penalty for its breach or it may not. If it contains no sanction, it may be broken with no other consequence than moral guilt: if it have a sanction, then the breach insures the designated or implied penalty. A league between independent nations, generally, has no sanction other than a moral one; or if it should contain a penalty, as there is no common superior, it cannot be enforced. A government, on the contrary, always has a sanction, express or implied; and, in our case, it is both necessarily implied and expressly given. An attempt, by force of arms, to destroy a government, is an offence by whatever means the constitutional compact may have been formed, and such government has the right, by the law of self-defence, to pass acts for punishing the offender, unless that right is modified, restrained, or resumed by the constitutional act. In our system, although it is modified in the case of treason, yet authority is expressly given to pass all laws necessary to carry its powers into effect, and, under this grant, provision has been made for punishing acts which obstruct the due administration of the laws. . . .

The States severally have not retained their entire sovereignty. It has been shown that, in becoming parts of a nation, not members of a league, they surrendered many of their essential parts of sovereignty. The right to make treaties — declare war — levy taxes — exercise exclusive judicial and legislative powers — were all of them functions of sovereign power. The States, then, for all these purposes, were no longer sovereign. The allegiance of their citizens was transferred, in the first instance, to the Government of the United States: they became American citizens, and owed obedience to the Constitution of the United States, and to laws made in conformity with the powers it vested in Congress. This last position has not been, and cannot be denied. How, then, can that State be said to be sovereign and independent whose citizens owe obedience to laws not made by it, and whose magistrates are sworn to disregard those laws when they come in conflict with those passed by another? What shows conclusively that the States cannot be said to have reserved an undivided sovereignty, is, that they expressly ceded the right to punish treason, not treason against their separate power, but treason against the United States. Treason is an offence against *sovereignty*, and sovereignty must reside with the power to punish it. But the reserved rights of the States are not less sacred because they have, for their common interest, made the General Government a depository of these powers. . . .

104. *Webster's Reply to Hayne of South Carolina.*¹

I understand the honorable gentleman from South Carolina to maintain, that it is a right of the State Legislatures to interfere, whenever, in their judgment, this Government transcends its constitutional limits, and to arrest the operation of its laws. . . .

What he contends for, is, that it is constitutional to interrupt the administration of the constitution itself, in the hands of those who are chosen and sworn to administer it, by the direct

¹ Senate. January 26-27, 1830. *Works of Daniel Webster* (1851), III, 270-342, *passim*.

interference, in form of law, of the States, in virtue of their sovereign capacity. The inherent right in the people to reform their government, I do not deny; and they have another right, and that is, to resist unconstitutional laws, without overturning the Government. It is no doctrine of mine, that unconstitutional laws bind the people. The great question is, whose prerogative is it to decide on the constitutionality or unconstitutionality of the laws? On that, the main debate hinges. The proposition, that, in case of a supposed violation of the constitution by Congress, the States have a constitutional right to interfere, and annul the law of Congress, is the proposition of the gentleman: I do not admit it. If the gentleman had intended no more than to assert the right of revolution, for justifiable cause, he would have said only what all agree to. But I cannot conceive that there can be a middle course, between submission to the laws, when regularly pronounced constitutional, on the one hand, and open resistance, which is revolution, or rebellion, on the other. I say, the right of a State to annul a law of Congress, cannot be maintained but on the ground of the unalienable right of man to resist oppression; that is to say, upon the ground of revolution. I admit that there is an ultimate violent remedy, above the constitution, and in defiance of the constitution, which may be resorted to, when a revolution is to be justified. But I do not admit that, under the constitution, and in conformity with it, there is any mode in which a State Government, as a member of the Union, can interfere and stop the progress of the General Government, by force of her own laws, under any circumstances whatever.

This leads us to inquire into the origin of this Government, and the source of its power. Whose agent is it? Is it the creature of the State Legislatures, or the creature of the people? If the Government of the United States be the agent of the State Governments, then they may control it, provided they can agree in the manner of controlling it; if it be the agent of the people, then the people alone can control it, restrain it, modify, or reform it. It is observable enough, that the doctrine for

which the honorable gentleman contends leads him to the necessity of maintaining, not only that this General Government is the creature of the States, but that it is the creature of each of the States, severally; so that each may assert the power, for itself, of determining whether it acts within the limits of its authority. It is the servant of four and twenty masters, of different wills and different purposes, and yet bound to obey all. This absurdity (for it seems no less) arises from a misconception as to the origin of this Government and its true character. It is, sir, the people's constitution, the people's Government; made for the people; made by the people; and answerable to the people. The people of the United States have declared that this constitution shall be the supreme law. We must either admit the proposition, or dispute their authority. The States are, unquestionably, sovereign, so far as their sovereignty is not affected by this supreme law. But the State Legislatures, as political bodies, however sovereign, are yet not sovereign over the people. So far as the people have given power to the General Government, so far the grant is unquestionably good, and the Government holds of the people, and not of the State Governments. We are all agents of the same supreme power, the people. The General Government and the State Governments derive their authority from the same source. Neither can, in relation to the other, be called primary, though one is definite and restricted, and the other general and residuary. The National Government possesses those powers which it can be shown the people have conferred on it, and no more. All the rest belongs to the State Governments or to the people themselves. So far as the people have restrained State sovereignty, by the expression of their will, in the constitution of the United States, so far, it must be admitted, State sovereignty is effectually controlled. I do not contend that it is, or ought to be, controlled farther. The sentiment to which I have referred, propounds that State sovereignty is only to be controlled by its own "feeling of justice;" that is to say, it is not to be controlled at all: for one who is to follow his own feelings is under no legal control. Now, however men may think this ought to

be, the fact is, that the people of the United States have chosen to impose control on State sovereignties. There are those, doubtless, who wish they had been left without restraint; but the constitution has ordered the matter differently. To make war, for instance, is an exercise of sovereignty; but the constitution declares that no State shall make war. To coin money is another exercise of sovereign power; but no State is at liberty to coin money. Again, the constitution says that no sovereign State shall be so sovereign as to make a treaty. . . .

I must now beg to ask, sir, whence is this supposed right of the states derived? Where do they find the power to interfere with the laws of the Union? Sir, the opinion which the honorable gentleman maintains, is a notion founded in a total misapprehension, in my judgment, of the origin of this Government, and of the foundation on which it stands. I hold it to be a popular Government, erected by the people; those who administer it, responsible to the people; and itself capable of being amended and modified, just as the people may choose it should be. It is as popular, just as truly emanating from the people, as the State Governments. It is created for one purpose; the State Governments for another. It has its own powers; they have theirs. There is no more authority with them to arrest the operation of a law of Congress, than with Congress to arrest the operation of their laws. We are here to administer a constitution emanating immediately from the people, and trusted, by them, to our administration. It is not the creature of the State Governments. . . .

The people, then, sir, erected this Government. They gave it a constitution; and in that constitution they have enumerated the powers which they bestow on it. They have made it a limited Government. They have defined its authority. They have restrained it to the exercise of such powers as are granted; and all others, they declare, are reserved to the States or the people. But, sir, they have not stopped here. If they had, they would have accomplished but half their work. No definition can be so clear as to avoid possibility of doubt; no limitation so precise, as to exclude all uncertainty. Who then shall con-

strue this grant of the people? Who shall interpret their will, where it may be supposed they have left it doubtful? With whom do they repose this ultimate right of deciding on the powers of the Government? Sir, they have settled all this in the fullest manner. They have left it with the Government itself, in its appropriate branches. Sir, the very chief end, the main design, for which the whole constitution was framed and adopted was, to establish a Government that should not be obliged to act through State agency, or depend on State opinion and State discretion. The people had had quite enough of that kind of government, under the Confederacy. Under that system, the legal action, the application of law to individuals, belonged exclusively to the States. Congress could only recommend; their acts were not of binding force, till the States had adopted and sanctioned them? Are we in that condition still? Are we yet at the mercy of State discretion, and State construction? Sir, if we are, then vain will be our attempt to maintain the constitution under which we sit. But, sir, the people have wisely provided, in the constitution itself, a proper, suitable mode and tribunal for settling questions of constitutional law. There are, in the constitution, grants of powers to Congress, and restrictions on these powers. There are, also, prohibitions on the States. Some authority must, therefore, necessarily exist, having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions, and prohibitions. The constitution has, itself, pointed out, ordained, and established, that authority. How has it accomplished this great and essential end? By declaring, sir, that "the constitution and the laws of the United States, made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding."

This, sir, was the first great step. By this, the supremacy of the constitution and laws of the United States is declared. The people so will it. No State law is to be valid which comes in conflict with the constitution or any law of the United States passed in pursuance of it. But who shall decide this question

of interference? To whom lies the last appeal? This, sir, the constitution itself decides also, by declaring "that the judicial power shall extend to all cases arising under the constitution and laws of the United States." These two provisions, sir, cover the whole ground. They are, in truth, the key-stone of the arch. With these, it is a constitution; without them, it is a confederacy. In pursuance of these clear and express provisions, Congress established, at its very first session, in the Judicial Act, a mode for carrying them into full effect, and for bringing all questions of constitutional power to the final decision of the Supreme Court. It then, sir, became a Government. . . .

If any thing be found in the national constitution, either by original provision, or subsequent interpretation, which ought not to be in it, the people know how to get rid of it. If any construction be established, unacceptable to them, so as to become, practically, a part of the constitution, they will amend it at their own sovereign pleasure. But while the people choose to maintain it as it is; while they are satisfied with it, and refuse to change it, who has given, or who can give, to the State Legislatures, a right to alter it, either by interference, construction, or otherwise? Gentlemen do not seem to recollect that the people have any power to do anything for themselves; they imagine there is no safety for them any longer than they are under the close guardianship of the State Legislatures. Sir, the people have not trusted their safety, in regard to the general constitution, to these hands. They have required other security, and taken other bonds. They have chosen to trust themselves, first, to the plain words of the instrument, and to such construction as the Government itself, in doubtful cases, should put on its own powers, under their oaths of office, and subject to their responsibility to them: just as the people of a State trust their own State Governments with a similar power. Secondly, they have reposed their trust in the efficacy of frequent elections, and in their own power to remove their own servants and agents, whenever they see cause. Thirdly, they have reposed trust in the Judicial power, which, in order that it might be trustworthy, they have made as respectable, as dis-

interested, and as independent as was practicable. Fourthly, they have seen fit to rely, in case of necessity, or high expediency, on their known and admitted power to alter or amend the constitution, peaceably and quietly, whenever experience shall point out defects or imperfections. And, finally, the people of the United States have, at no time, in no way, directly or indirectly, authorized any State Legislature to construe or interpret their high instrument of Government; much less to interfere, by their own power, to arrest its course and operation. . . .

CHAPTER XXXVIII

FEDERAL CONTROL OF STATE GOVERNMENTS

THE incidents referred to by the Court in the case of *Luther v. Borden* occurred during the Dorr Rebellion in Rhode Island. After the Revolution, Rhode Island continued her royal charter as the organic law of the Commonwealth. Under this constitution the suffrage was greatly restricted and much discontent was rife. Repeated efforts were made to amend the constitution, but these were invariably defeated by the opposition of the legal voters. Finally, a movement was set on foot for a convention to be elected by universal suffrage, which should draft a constitution on democratic lines. The movement so far succeeded that a convention was held and a constitution drafted. The attempt to put this new constitution into operation led to open rebellion. The governor of the State then called upon the Federal Government for aid.

105. *President Tyler to the Governor of Rhode Island.*¹

. . . This is the first occasion, so far as the government of a State and its people are concerned, on which it has become necessary to consider of the propriety of exercising these high and most important constitutional and legal functions. By a careful consideration of the above recited acts of Congress, your Excellency will not fail to see, that no power is vested in the Executive of the United States to anticipate insurrectionary movements against the Government of Rhode Island, so as to sanction the interposition of the military authority, but that there must be an actual insurrection manifested by lawless assemblages of the people or otherwise, to whom a proclamation may be addressed, and who may be required to betake themselves to their respective abodes. I have, however, to assure your Excellency that should the time arrive, (and my fervent prayer is that it may never come,) when an insurrection shall exist against the Government of Rhode Island, and a requisition shall be made upon the Executive of the United States to furnish that protection which is guarantied to each

¹ April 11, 1842. *Broadside* in Yale University Library.

State by the Constitution and laws, I shall not be found to shrink from the performance of a duty, which while it would be the most painful, is at the same time the most imperative.

I have also to say that, in such a contingency, the Executive could not look into real or supposed defects of the existing government, in order to ascertain whether some other plan of government proposed for adoption was better suited to the wants and more in accordance with the wishes of any portion of her citizens. To throw the Executive power of this Government into any such controversy, would be to make the President the armed arbitrator between the people of the different States and their constituted authorities, and might lead to an usurped power, dangerous alike to the stability of the State Governments and the liberties of the people.

It will be my duty, on the contrary, to respect the requisitions of that government which has been recognized as the existing Government of the State through all time past, until I shall be advised in regular manner, that it has been altered and abolished, and another substituted in its place, by legal and peaceable proceedings, adopted and pursued by the authorities and people of the State. . . .

106. *Memorial of the Democratic Members of the Legislature of Rhode Island.*¹

. . . A large majority of the adult male inhabitants of the State of Rhode Island, being citizens of the United States, after having long waited in vain for an amendment, through the old charter government, of the political institutions of this State, in order to bring them into conformity to the standard of a democratic republic, to define and regulate the unlimited powers of the General Assembly, and to secure to the people the right of suffrage and other just rights, of which they had long been deprived, in the exercise of their original sovereign capacity, did, in December, 1841, rightfully adopt and duly ratify a constitution of government, republican in its form and character, agreeably to the guaranty of the constitution of the

¹ February 1, 1844. *House Reports*, No. 546. 28 Cong., 1 Sess.

United States. The votes given in for this constitution were signed by the voters, and have been carefully preserved as a standing evidence of the will and action of the people.

Previously to the election of a government under the people's constitution, the President of the United States, issued a letter to the Governor, then acting under the charter and laws, in which he undertakes to prescribe the mode of proceeding to amend the institutions of a State, and declares, in effect, that the only valid change must be made by "the authorities and people;" placing the "authorities" before the people, making their consent and permission requisite to the action of the people, and reversing the great fundamental doctrine of our democratic republic — that all just government is founded in the consent of the governed; and that the people are, of course, superior to the servants intrusted with temporary power for convenience, and in order to do the will of their superiors.

A majority of the old charter House of Representatives was elected by towns containing less than one-third of the population of the State, and the voters in these towns were a third of the adult male inhabitants; so that the people of this State were ruled, under the old charter system, by one-ninth part of the adult male population, without whose permission, through their "authorities" in the General Assembly, according to the President, they could never come to the enjoyment of their inalienable rights. On the other hand, leaving to each State the question who are the people, we contend that a majority of the whole people are competent, of themselves, without permission, by an authentic act, to change their form of government.

The undersigned would call your attention to another important fact — that there was no mode prescribed by charter, law, or usage, in this State, for proceeding to change the government and to form a written constitution. All that the Assembly could do was to request the people to act; and they were at liberty to do so, or not; and could act as well without the request, which gave no power, as with it.

The President, in his letter aforesaid, conveyed the threat

of an intervention with the forces of the United States, in case the proceedings of the people to set up their government should be persisted in; and by increasing the number of troops at Newport, and by other demonstrations within striking distance, he gave all the advantages of actual military coöperation and invasion to the old charter party and their government, and enabled them, with the union of the State treasury and the military, to suppress the government elected under the people's constitution; to trample upon the rights of our citizens; maintain martial law over the people, in derogation of all law; to impose on the people, while thus under duress, another constitution, unjust, restrictive, and anti-republican, adopted by less than one-third of the adult male citizens; and, generally, to govern the State as a conquered territory, by despotic laws and by the military, and to exercise a political proscription, extending through all the relations of society and business, such as has never before been witnessed in any State in this Union. Many of our citizens have been driven from the State, into exile, by the course of the successful party. Large numbers have been imprisoned, and about fifteen are now under indictments for pretended treason and misdemeanors. One of their number (Thomas W. Dorr, who was elected Governor of the State under the people's constitution) has been kept in close prison for more than three months, under a charge of treason; but, in reality, for attempting to maintain, according to his oath of office, the people's constitution, and for carrying out the doctrines of the declaration of American independence.

The undersigned believe, and affirm, that this interference of the President in the affairs of a State, small of territory, easy of access, with an imperfect military organization, and incapable, by itself, of resisting a powerful attack from abroad, had the effect of overawing the people and of strengthening the adverse party; and that it mainly caused the overthrow of the people's constitution and government. If the President had let us alone, the new government would have been peaceably established, and generally acquiesced in.

The undersigned desire to make their solemn protest against

the course pursued by the President of the United States. If, under the name of suppressing "insurrections" and repressing "domestic violence," the President can thus control the States in their internal affairs, and cast the sword into the scale of the party which he espouses, he is, in fact, a military dictator of all-absorbing powers, to be brought out as occasion may require; State rights are a mockery, and the declaration of independence is (as it is here asserted to be) "a rhetorical flourish," intended for a purpose long since gone by; popular sovereignty is a delusion; and we have not, as was supposed at the Revolution, escaped from the aristocratic and monarchical doctrine of the Old World — that government is sovereign, and the people are subjects. . . .

107. *Luther v. Borden*.¹

Mr. Chief Justice Taney delivered the opinion of the Court:

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and other defendants, in the circuit court of the United States for the district of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong, and without any such

¹ Supreme Court of the United States, 1848. 7 Howard, 1.

cause; and upon the issue joined on this replication, the parties proceeded to trial. . . . The existence and authority of the government under which the defendants acted, was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it. . . .

The fourth section of the fourth article of the constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have

placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive, when the legislature cannot be convened, to call forth such number of militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government, cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy, and not of order. Yet

if this right does not reside in the courts when the conflict is raging — if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice

would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals. . . .

Undoubtedly, if the President, in exercising this power, shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it. . . .

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the circuit court must, therefore, be affirmed.

PART SIX. THE NEW DEMOCRACY

CHAPTER XXXIX

THE BASIS OF THE NEW DEMOCRACY

"CONSTITUTIONS are but paper; society is the substratum of government," said Fisher Ames. The earlier rule of the governing classes was possible because society recognized distinctions and the masses were deferential. The opening up of the Western lands, however, weakened the influence of the old land-owning class and exerted a leveling effect upon society, East and West. The demand everywhere for the removal of all restrictions upon the suffrage is evidence of the democratization of American society. The masses were becoming politically self-conscious and insisted upon a direct participation in the work of governing.

108. *Social Conditions and their Political Consequences.*¹

. . . The English laws concerning the transmission of property were abolished in almost all the States at the time of the Revolution. The law of entail was so modified as not materially to interrupt the free circulation of property. The first generation having passed away, estates began to be parcelled out; and the change became more and more rapid with the progress of time. And now, after a lapse of a little more than sixty years, the aspect of society is totally altered; the families of the great landed proprietors are almost all commingled with the general mass. In the State of New York, which formerly contained many of these, there are but two who still keep their heads above the stream; and they must shortly disappear. The sons of these opulent citizens have become merchants, lawyers, or physicians. Most of them have lapsed into obscurity. The last trace of hereditary ranks and distinctions is destroyed, — the law of partition has reduced all to one level.

I do not mean that there is any lack of wealthy individuals in the United States; I know of no country, indeed, where the

¹ De Tocqueville, *Democracy in America* (12th ed., trans. by Reeve), 1, 63-67 *passim*. The author records observations which he made in 1831.

love of money has taken a stronger hold on the affections of men, and where a profounder contempt is expressed for the theory of the permanent equality of property. But wealth circulates with inconceivable rapidity, and experience shows that it is rare to find two succeeding generations in the full enjoyment of it.

This picture, which may, perhaps, be thought to be overcharged, still gives a very imperfect idea of what is taking place in the new States of the West and Southwest. At the end of the last century, a few bold adventurers began to penetrate into the valley of the Mississippi; and the mass of the population very soon began to move in that direction: communities unheard of till then suddenly appeared in the desert. States whose names were not in existence a few years before, claimed their place in the American Union; and in the Western settlements we may behold democracy arrived at its utmost limits. In these States, founded off-hand, and as it were by chance, the inhabitants are but of yesterday. Scarcely known to one another, the nearest neighbors are ignorant of each other's history. In this part of the American continent, therefore, the population has escaped the influence not only of great names and great wealth, but even of the natural aristocracy of knowledge and virtue. None are there able to wield that respectable power which men willingly grant to the remembrance of a life spent in doing good before their eyes. The new States of the West are already inhabited; but society has no existence among them. . . .

In America, the aristocratic element has always been feeble from its birth; and if at the present day it is not actually destroyed, it is at any rate so completely disabled, that we can scarcely assign to it any degree of influence on the course of affairs.

The democratic principle, on the contrary, has gained so much strength by time, by events, and by legislation, as to have become not only predominant, but all-powerful. There is no family or corporate authority, and it is rare to find even the influence of individual character enjoy any durability.

America, then, exhibits in her social state an extraordinary phenomenon. Men are there seen on a greater equality in point of fortune and intellect, or, in other words, more equal in their strength, than in any other country of the world, or in any age of which history has preserved the remembrance. . . .

The political consequences of such a social condition as this are easily deducible.

It is impossible to believe that equality will not eventually find its way into the political world, as it does everywhere else. To conceive of men remaining forever unequal upon a single point, yet equal on all others, is impossible; they must come in the end to be equal upon all.

109. *Sovereignty of the People.*¹

In America, the principle of the sovereignty of the people is not either barren or concealed, as it is with some other nations; it is recognized by the customs and proclaimed by the laws; it spreads freely, and arrives without impediment at its most remote consequences. If there be a country in the world where the doctrine of the sovereignty of the people can be fairly appreciated, where it can be studied in its application to the affairs of society, and where its dangers and its advantages may be judged, that country is assuredly America. . . .

At the present day the principle of the sovereignty of the people has acquired, in the United States, all the practical development which the imagination can conceive. It is unencumbered by those fictions which are thrown over it in other countries, and it appears in every possible form, according to the exigency of the occasion. Sometimes the laws are made by the people in a body, as at Athens; and sometimes its representatives, chosen by universal suffrage, transact business in its name, and under its immediate supervision.

In some countries, a power exists which, though it is in a degree foreign to the social body, directs it, and forces it to pursue a certain track. In others, the ruling force is divided, being partly within and partly without the ranks of the people.

¹ De Tocqueville, *Democracy in America* (12th ed.), I, 69-72 *passim*.

But nothing of the kind is to be seen in the United States; there society governs itself for itself. All power centres in its bosom; and scarcely an individual is to be met with who would venture to conceive, or, still less, to express, the idea of seeking it elsewhere. The nation participates in the making of its laws by the choice of its legislators, and in the execution of them by the choice of the agents of the executive government; it may almost be said to govern itself, so feeble and so restricted is the share left to the administration, so little do the authorities forget their popular origin and the power from which they emanate. The people reign in the American political world as the Deity does in the universe. They are the cause and the aim of all things; everything comes from them, and everything is absorbed in them.

110. *Chancellor Kent on Universal Suffrage.*¹

The senate has hitherto been elected by the farmers of the state — by the free and independent lords of the soil, worth at least \$250 in freehold estate, over and above all debts charged thereon. The governor has been chosen by the same electors, and we have hitherto elected citizens of elevated rank and character. Our assembly has been chosen by freeholders, possessing a freehold of the value of \$50, or by persons renting a tenement of the yearly value of \$5, and who have been rated and actually paid taxes to the state. By the report before us, we propose to annihilate, at one stroke, all those property distinctions and to bow before the idol of universal suffrage. That extreme democratic principle, when applied to the legislative and executive departments of government, has been regarded with terror, by the wise men of every age, because in every European republic, ancient and modern, in which it has been tried, it has terminated disastrously, and been productive of corruption, injustice, violence, and tyranny. And dare we flatter ourselves that we are a peculiar people, who can run the career of history, exempted from the passions which have dis-

¹ New York Convention of 1821, *Reports of the Proceedings and Debates*, 219-22 *passim*.

turbed and corrupted the rest of mankind? If we are like other races of men, with similar follies and vices, then I greatly fear that our posterity will have reason to deplore in sackcloth and ashes, the delusion of the day.

It is not my purpose at present to interfere with the report of the committee, so far as respects the qualifications of electors for governor and members of assembly. I shall feel grateful if we may be permitted to retain the stability and security of a senate, bottomed upon the freehold property of the state. Such a body, so constituted, may prove a sheet anchor amidst the future factions and storms of the republic. The great leading and governing interest of this state, is, at present, the agricultural; and what madness would it be to commit that interest to the winds. The great body of the people, are now the owners and actual cultivators of the soil. With that wholesome population we always expect to find moderation, frugality, order, honesty, and a due sense of independence, liberty, and justice. It is impossible that any people can lose their liberties by internal fraud or violence, so long as the country is parcelled out among freeholders of moderate possessions, and those freeholders have a sure and efficient control in the affairs of the government. Their habits, sympathies, and employments, necessarily inspire them with a correct spirit of freedom and justice; they are the safest guardians of property and the laws: We certainly cannot too highly appreciate the value of the agricultural interest: It is the foundation of national wealth and power. According to the opinion of her ablest political economists, it is the surplus produce of the agriculture of England, that enables her to support her vast body of manufacturers, her formidable fleets and armies, and the crowds of persons engaged in the liberal professions, and the cultivation of the various arts.

Now, sir, I wish to preserve our senate as the representative of the landed interest. I wish those who have an interest in the soil, to retain the exclusive possession of a branch in the legislature, as a strong hold in which they may find safety through all the vicissitudes which the state may be destined, in the

course of Providence, to experience. I wish them to be always enabled to say that their freeholds cannot be taxed without their consent. The men of no property, together with the crowds of dependants connected with great manufacturing and commercial establishments, and the motley and undefinable population of crowded ports, may, perhaps, at some future day, under skillful management, predominate in the assembly, and yet we should be perfectly safe if no laws could pass without the free consent of the owners of the soil. That security we at present enjoy; and it is that security which I wish to retain.

The apprehended danger from the experiment of universal suffrage applied to the whole legislative department, is no dream of the imagination. It is too mighty an excitement for the moral constitution of men to endure. The tendency of universal suffrage, is to jeopardize the rights of property, and the principles of liberty. There is a constant tendency in human society, and the history of every age proves it; there is a tendency in the poor to covet and to share the plunder of the rich; in the debtor to relax or avoid the obligation of contracts; in the majority to tyrannize over the minority, and trample down their rights; in the indolent and the profligate, to cast the whole burthens of society upon the industrious and the virtuous; and *there is a tendency in ambitious and wicked men, to inflame these combustible materials*. It requires a vigilant government, and a firm administration of justice, to counteract that tendency. Thou shalt not covet; thou shalt not steal; are divine injunctions induced by this miserable depravity of our nature. . . .

The growth of the city of New-York is enough to startle and awaken those who are pursuing the *ignis fatuus* of universal suffrage. . . .

It is rapidly swelling into the unwieldy population, and with the burdensome pauperism, of an European metropolis. New-York is destined to become the future London of America; and in less than a century, that city, with the operation of universal suffrage, and under skilful direction, will govern this state.

The notion that every man that works a day on the road,

or serves an idle hour in the militia, is entitled as of right to an equal participation in the whole power of the government, is most unreasonable, and has no foundation in justice. We had better at once discard from the report such a nominal test of merit. If such persons have an equal share in one branch of the legislature, it is surely as much as they can in justice or policy demand. Society is an association for the protection of property as well as of life, and the individual who contributes only one cent to the common stock, ought not to have the same power and influence in directing the property concerns of the partnership, as he who contributes his thousands. He will not have the same inducements to care, and diligence, and fidelity. His inducements and his temptation would be to divide the whole capital upon the principles of an agrarian law.

Liberty, rightly understood, is an inestimable blessing, but liberty without wisdom, and without justice, is no better than wild and savage licentiousness. The danger which we have hereafter to apprehend, is not the want, but the abuse, of liberty. We have to apprehend the oppression of minorities, and a disposition to encroach on private right — to disturb chartered privileges — and to weaken, degrade, and overawe the administration of justice; we have to apprehend the establishment of unequal, and consequently, unjust systems of taxation, and all the mischiefs of a crude and mutable legislation. A stable senate, exempted from the influence of universal suffrage, will powerfully check these dangerous propensities, and such a check becomes the more necessary, since this Convention has already determined to withdraw the watchful eye of the judicial department from the passage of laws.

We are destined to become a great manufacturing as well as commercial state. We have already numerous and prosperous factories of one kind or another, and one master capitalist with his one hundred apprentices, and journeymen, and agents, and dependents, will bear down at the polls an equal number of farmers of small estates in his vicinity, who cannot safely unite for their common defence. Large manufacturing and

mechanical establishments, can act in an instant with the unity and efficacy of disciplined troops. It is against such combinations, among others, that I think we ought to give to the freeholders, or those who have interest in land, one branch of the legislature for their asylum and their comfort. Universal suffrage once granted, is granted forever, and never can be recalled. There is no retrograde step in the rear of democracy. However mischievous the precedent may be in its consequences, or however fatal in its effects, universal suffrage never can be recalled or checked, but by the strength of the bayonet. We stand, therefore, this moment, on the brink of fate, on the very edge of the precipice. If we let go our present hold on the senate, we commit our proudest hopes and our most precious interests to the waves.

III. *Property not the True Basis of Representation.*¹

When our constitution was framed, the domain of the state was in the hands of a few. The proprietors of the great manors were almost the only men of great influence; and the landed property was deemed worthy of almost exclusive consideration. Before the revolution, freeholders only were allowed to exercise the right of suffrage. The notions of our ancestors, in regard to real property, were all derived from England. The feudal tenures were universally adopted. The law of primogeniture, by which estates descended to the eldest son, and the rule of descent by which the male branches inherited the paternal estate, to the exclusion of the female, entails, and many other provisions of feudal origin were in force. The tendency of this system, it is well understood, was to keep the lands of the state in few hands. But since that period, by the operation of wiser laws, and by the prevalence of juster principles, an entire revolution has taken place in regard to real property. Our laws for regulating descents, and for converting entailed estates into fee-simple, have gradually increased the number of landholders: Our territory has been rapidly divided

¹ New York Convention of 1821, *Reports of the Proceedings and Debates*, 241-44 *passim*.

and subdivided: And although the landed interest is no longer controlled by the influence of a few great proprietors, its aggregate importance is vastly increased, and almost the whole community have become interested in its protection. In New-England, the inhabitants, from the earliest period, have enjoyed the system which we are progressively attaining to. There, the property of the soil has always been in the hands of the *many*. The great bulk of the population are farmers and freeholders, yet no provision is incorporated in their constitutions, excluding those who are not freeholders from a full participation in the right of suffrage. May we not trace the notions of the framers of our constitution, respecting the exclusive privilege of the freeholders, to the same source from whence they derived all their ideas of real property? . . .

I contend, that by the true principle of our government, property, as such, is not the basis of representation. Our community is an association of persons — of human beings — not a partnership founded on property. The declared object of the people of this state in associating, was, to “establish such a government as they deemed best calculated to secure the rights and liberties of the good people of the state, and most conducive to their happiness and safety.” Property, it is admitted, is one of the rights to be protected and secured; and although the protection of life and liberty is the highest object of attention, it is certainly true, that the security of property is a most interesting and important object in every free government. Property is essential to our temporal happiness; and is necessarily one of the most interesting subjects of legislation. The desire of acquiring property is a universal passion. I readily give to property the important place which has been assigned to it by the honourable member from Albany (Chancellor Kent.) To property we are indebted for most of our comforts, and for much of our temporal happiness. The numerous religious, moral, and benevolent institutions which are everywhere established, owe their existence to wealth; and it is wealth which enables us to make those great internal improvements which we have undertaken. Property is only

one of the incidental rights of the person who possesses it; and, as such, it must be made secure; but it does not follow, that it must therefore be represented specifically in any branch of the government. It ought, indeed, to have an influence — and it ever will have, when properly enjoyed. So ought talents to have an influence. It is certainly as important to have men of good talents in your legislature, as to have men of property; but you surely would not set up men of talents as a separate order, and give them exclusive privileges.

The truth is, that both wealth and talents will ever have a great influence; and without the aid of exclusive privileges, you will always find the influence of both wealth and talents predominant in our halls of legislation.

CHAPTER XL

CONSTITUTIONAL CHANGES IN THE STATES

THE constitutions of the new States, which were formed out of the public domain during the two decades following the War of 1812, bear witness to the democratic tendencies of frontier communities. In contrast to the constitutions of the Revolutionary period, two tendencies appear: first, a disposition to remove all obstacles from the path of popular sovereignty; and secondly, a determination to strengthen and expand the executive at the expense of the legislative power. The reaction of Western democracy upon the older States led to similar changes in their constitutions. By the middle of the century a third tendency appears: to make the judiciary also dependent upon the popular will by election.

112. *Veto Power of the Governor.*¹

In a free representative government there is a strong and natural tendency to *excessive* legislation. That department must be composed of a very numerous body of men. In general we may hope, that they will possess sound and upright intentions; but a majority of them will probably possess little experience in framing laws: and the nature of man, and our own experience shew, that men, suddenly elevated to power, have a natural proneness to use their power immoderately. Our state, in common with others, has from time to time had many bold and rude reformers; who see evils and disorders all around them, in whatever does not accord with their own narrow views of public policy; and who often apply remedies with so unskilful a hand, and with so little wisdom and circumspection, that in curing one evil, they create many others. Such an inexperienced lawgiver has his eye intently fixed on some particular mischief which he supposes to exist, and then, with a strong hand he extirpates that evil; but in doing so he often throws down the fences erected for the security of private rights. Almost every man who comes to the legislature seems to sup-

¹ Judge Platt in the New York Convention of 1821, *Reports of Proceedings and Debates*, 52-53.

pose that he is bound to do something; and this propensity is so strong, that it is often excited into a passion and a rage. All change in the public laws of the state is in itself an evil. It renders the rule of action for a time unknown or uncertain. The stability of laws inspires confidence; and the success of all our prospective plans in the various business of life must essentially depend on that stability. Fickle caprice is the law of a tyrant's will; and in proportion as our laws are unstable, they partake of that characteristic feature of tyranny.

Besides, sir, it is not to be disguised, that we are at all times exposed to the arts and designs of ambitious demagogues, to selfish intriguers, who speculate on the public bounty, through means of party favouritism; and to that *esprit de corps*, which under strong party excitement, often infests with contagious influence, all who are within its immediate atmosphere. The pride of our nature is often humbled, when we see men, who in their private life and character are deserving of all our confidence and esteem; yet, when associated in large assemblies, and inflamed with party zeal, are induced to commit intemperate acts of outrage and violence under the false pleas of public necessity, or of retaliation and self-defence — acts, of which any one of them, in a moment of calm reflection, would blush to think himself capable.

These, sir, are some of the infirmities and vices inherent in our form of government; and so long as man continues imperfect and depraved, these evils must ever attend the many blessings which we enjoy under our happy republic. But while this truth admonishes that perfection is unattainable in any human device; it solemnly warns us on this occasion, to retain or provide every suitable check and guard against those evils; so far as human sagacity and wisdom can discern and prevent them.

On this subject, sir, it is important to realize the distinction between the *actual* powers of legislation, and a mere *negative veto*. The power of making or altering the law ought unquestionably to be confided to the two houses of the legislature exclusively. That power expands itself to all objects not forbidden by the constitution, or the fundamental and universal

principles of justice. — Such vast powers are obviously liable to great abuse; and if abused, the injurious effects are permanent; and in a great measure incurable. If the legislature pass a law which is unconstitutional, the judicial tribunals, if the case be regularly presented to them, will declare it null and void. But in many cases, a long time elapses between the passing of the act, and the judicial interpretation of it; and what, let me ask, is the condition of the people during that interval? Who, in such a case, can safely regulate his conduct? In many cases a person is compelled to act in reference to such a statute, while he is necessarily involved in doubt as to its validity.

But where the legislature abuse their discretion, on questions of *expediency* merely, the mischief is often still worse. In all cases of *private* acts, which comprize three fourths of our statute book, the evil of an improvident act is incurable, because it usually vests private rights in individuals or corporations which no power under the government can afterwards repeal or annul. No matter how unequal, unwise, or inconvenient, such laws must be carried into effect. *Fieri non debet; factum valet.*

But in regard to the evils which might by possibility flow from the improper exercise of the qualified veto on the legislature, they are very limited in their effects, and of far less dangerous character. The council of revision, or the executive holding this check, can originate no bill, nor make nor alter any law. The effect of the objections where they prevail, can only produce the result of suspending the legislative will of the two houses. And the worst consequence which can ordinarily happen, is, that the people must remain under the law as it stood; until the voice of the people, through their new representatives, shall produce a change.

113. *The Governor as "the Man of the People."*¹

I have long been sensible, in common with a large class of the community, that we have too much legislation. It renders

¹ Ogden Edwards in the New York Convention of 1821, *Reports of Proceedings and Debates*, 60-61.

the law unstable, and it requires a good lawyer to keep pace with the construction it receives. All that the governor can say, when vested with the powers contemplated by the committee, is — stay your hand. If gentlemen are afraid that we shall not have law enough, let them go to the lawyers' shelves and tables that groan beneath the burden. An erroneous idea seems to have prevailed in relation to the powers and origin of the governor. Who is he? and by whom is he appointed? Does he derive his authority from the king of Great Britain? Is he an usurper? If so, let us unite to depose him. But, sir, he is the man of the people — elected by their suffrage, and identified with their interests. He is a watchful sentinel to guard us from evil, and a zealous friend to admonish us of error. Much has been said respecting the necessity of keeping separate the different branches of the government. I yield a cordial acquiescence to the principle. But if we content ourselves with parchment regulations — if nothing more effectual is done than to authorize the governor to recommend a reconsideration of the bills that are passed, it is easy to perceive that the weaker power will be trodden down by the stronger, and that the executive has become a cypher before the representatives of the people. On this, as on all other subjects, however, I have but one object in view. That object is to endeavour that the agents of the public are so guarded, checked, and controled, that the people may lie down and rest in security, with the consciousness that their rights will be protected.

114. *Political Power of the Judiciary.*¹

The Americans have retained these three distinguishing characteristics of the judicial power: an American judge can only pronounce a decision when litigation has arisen, he is conversant only with special cases, and he cannot act until the cause has been duly brought before the court. His position is, therefore, perfectly similar to that of the magistrates of other nations; and yet he is invested with immense political power.

¹ De Tocqueville, *Democracy in America* (12th ed.), I, 125-30.

How comes that about? If the sphere of his authority and his means of action are the same as those of other judges, whence does he derive a power which they do not possess? The cause of this difference lies in the simple fact, that the Americans have acknowledged the right of the judges to found their decisions on the *Constitution* rather than on the *laws*. In other words, they have not permitted them to apply such laws as may appear to them to be unconstitutional. . . .

Whenever a law which the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence. In truth, few laws can escape the searching analysis of the judicial power for any length of time, for there are few which are not prejudicial to some private interest or other, and none which may not be brought before a court of justice by the choice of parties, or by the necessity of the case. But as soon as a judge has refused to apply any given law in a case, that law immediately loses a portion of its moral force. Those to whom it is prejudicial learn that means exist of overcoming its authority; and similar suits are multiplied, until it becomes powerless. The alternative, then, is, that the people must alter the constitution, or the legislature must repeal the law. The political power which the Americans have intrusted to their courts of justice is therefore immense; but the evils of this power are considerably diminished by the impossibility of attacking the laws except through the courts of justice. . . .

Within these limits, the power vested in the American courts of justice, of pronouncing a statute to be unconstitutional, forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies.

115. *Popular Election of the Judiciary.*¹

Now, sir, this question of electing judges by the people seems to have taken some gentlemen by surprise. I recollect

¹ *Debates and Proceedings of the Maryland Reform Convention* (1851), II, 461-64 *passim*.

the time very well when it was considered a radical proposition. I recollect the time very well when, perhaps, you could not find one man in twenty who thought that the judges should be elected by the people. But I have lived to see the day when I find not over one in twenty who is opposed to it. If there is any subject at all upon which, more than any other, the popular mind has undergone a change, in my judgment, it is this in regard to the election of judges by the people. . . .

Sir, the question is one simply of expediency — whether the people shall be reunited to their original rights or not? Whether the power shall be given to them, not for the first time, for this I think was settled by the Revolution, but as a reversionary right to which they have just claims of inheritance. They do not ask for power which they never possessed before, for they had it by the Bill of Rights, of 1776, and by the Constitution of 1776, they granted it to subordinate agents. That Constitution being about to expire, these powers necessarily went to the people, their original and rightful owners. In the great trial which was then to be made — this experiment of self-government — the people were induced to part with this power. They incorporated as a provision in the Constitution of 1776, that the Governor and the Council should have the appointment of judges, chancellor, and all judicial officers. Sir, this was a grant of power — a relinquishment of their own rights and interests to mere subordinate agents. . . .

We have confided to you, the Governor and Council, or you the Governor and Senate, this power of appointment for wise, wholesome, and good purposes. We expected that in the execution of this power, you would look alone to the common good of the people of the State. How have you exercised the power? In the appointment of judges, have you made the interests of the people your great polar star to guide you? No. It has become a mere political machine in the hands of the Governor and his friends, the Governor and the Senate, and their friends. It is made a great political engine, by which the interests of a large portion of the people of the State have been sacrificed for the elevation of others. You have not always looked alone

to the legal attainments and uprightness of the men you have put upon the bench. You have not always looked to their integrity of character, their honesty, their capability, and the standing which they ought to have by reason of their virtues; you have selected, in many cases, mere partisan adherents to certain political creeds. I am now using language which the people have a right to use to those subordinate agents, who have heretofore had the exercise of this power. . . .

I will trust the people, because I believe that they will select wise and good and honest judges. To fill the station of a judge, we want a man who has a clear head and an honest heart. I care not whether he be a Demosthenes or a Cicero — whether his imagination can soar among the clouds, or play with the thunders, and storms, and lightnings, or not. I want a man of good, sound sense, calm, deliberate judgment, and, above all, a man of integrity. These are the men that the people will elect for their judges — these are not the men that the Governor and Senate have usually looked for. . . .

If we refuse to confide the power of appointment to the people, we violate the great and fundamental principle which we have professed to venerate from our cradles up to manhood — I mean the right of the people to govern themselves — a principle to be forever held sacred by every true friend of republican government.

CHAPTER XLI

PRESIDENT AND CONGRESS: THE VETO POWER

BEFORE the administration of Andrew Jackson, the veto power had been exercised only nine times. The earlier Presidents, as the *Federalist* anticipated, were disposed to use the veto with caution, not wishing to put themselves into opposition to the well-considered purposes of Congress, except in those instances when Congress seemed to have exceeded its constitutional powers. President Jackson was deterred by no such scruples. By his veto messages, notably by his veto of the Bank Bill, he put himself squarely athwart the will of Congress. Not once only, but twelve times he exercised what one of his cabinet officers styled "the people's tribunative prerogative." The protest of Henry Clay against the veto was occasioned by President Tyler's rejection of successive bills for the establishment of a new national bank. There is no evidence that Clay's proposed amendment of the Constitution commanded popular support. On the contrary, President Polk's vigorous assertion of the representative character of the presidential office indicates that the public mind had acquiesced in the precedent set by Jackson.

116. *President Jackson's Bank Veto.*¹

. . . A Bank of the United States is, in many respects, convenient for the Government, and useful to the people. Entertaining this opinion, and deeply impressed with the belief that some of the powers and privileges possessed by the existing bank are unauthorized by the constitution, subversive of the rights of the States, and dangerous to the liberties of the people, I felt it my duty, at an early period of my administration, to call the attention of Congress to the practicability of organizing an institution combining all its advantages, and obviating these objections. I sincerely regret, that, in the act before me, I can perceive none of those modifications of the bank charter which are necessary, in my opinion, to make it compatible with justice, with sound policy, or with the constitution of our country. . . .

The modifications of the existing charter, proposed by this

¹ Richardson, *Messages and Papers of the Presidents*, II, 576-91 *passim*. July 10, 1832.

act, are not such, in my view, as make it consistent with the rights of the States or the liberties of the people. The qualification of the right of the bank to hold real estate, the limitation of its power to establish branches, and the power reserved to Congress to forbid the circulation of small notes, are restrictions comparatively of little value or importance. All the objectionable principles of the existing corporation, and most of its odious features, are retained without alleviation. . . .

Is there no danger to our liberty and independence in a bank, that, in its nature, has so little to bind it to our country? The President of the bank has told us that most of the State banks exist by its forbearance. Should its influence become concentrated, as it may under the operation of such an act as this, in the hands of a self-elected directory, whose interests are identified with those of the foreign stockholder, will there not be cause to tremble for the purity of our elections in peace, and for the independence of our country in war? Their power would be great whenever they might choose to exert it; but if this monopoly were regularly renewed every fifteen or twenty years, on terms proposed by themselves, they might seldom in peace put forth their strength to influence elections, or control the affairs of the nation. But if any private citizen or public functionary should interpose to curtail its powers, or prevent a renewal of its privileges, it cannot be doubted that he would be made to feel its influence.

Should the stock of the bank principally pass into the hands of the subjects of a foreign country, and we should unfortunately become involved in a war with that country, what would be our condition? Of the course which would be pursued by a bank almost wholly owned by the subjects of a foreign power, and managed by those whose interests, if not affections, would run in the same direction, there can be no doubt. All its operations within, would be in aid of the hostile fleets and armies without. Controlling our currency, receiving our public moneys, and holding thousands of our citizens in dependance, it would be more formidable and dangerous than the naval and military power of the enemy. . . .

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank, have been, probably, to those in its favor, as four to one. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the constitution. Each public officer, who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress, than the opinion of Congress has over the judges; and, on that point, the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

But, in the case relied upon, the Supreme Court have not decided that all the features of this corporation are compatible with the constitution. It is true that the court have said that the law incorporating the bank is a constitutional exercise of power by Congress. But, taking into view the whole opinion of the court, and the reasoning by which they have come to that conclusion, I understand them to have decided that, inasmuch as a bank is an appropriate means for carrying into effect the enumerated powers of the General Government, therefore the law incorporating it is in accordance with that provision of the constitution which declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying those powers into execution." Having satisfied themselves that the word "*necessary*" in the constitution, means "*needful*," "*requisite*," "*essential*," "*conducive to*," and that "a bank" is a convenient, a useful, and essential instrument, in the prosecution of the Government's "fiscal operations," they conclude, that to "use one must be within the discretion of Congress," and that "the act to incorporate the Bank of the United States is a law made in pursuance of the constitution": "but," say they, "*where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.*"

The principle here affirmed is, that the "degree of its necessity," involving all the details of a banking institution, is a question exclusively for legislative consideration. A bank is constitutional; but it is the province of the Legislature to determine whether this or that particular power, privilege, or exemption, is "necessary and proper" to enable the bank to discharge its duties to the Government; and, from their decision, there is no appeal to the courts of justice. Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* in order to enable the bank to perform conveniently and efficiently the public duties

assigned to it as a fiscal agent, and therefore constitutional; or *unnecessary* and *improper*, and therefore unconstitutional. . . .

. . . That a Bank of the United States, competent to all the duties which may be required by the Government, might be so organized as not to infringe on our own delegated powers, or the reserved rights of the States, I do not entertain a doubt. Had the Executive been called upon to furnish the project of such an institution, the duty would have been cheerfully performed. In the absence of such a call, it is obviously proper that he should confine himself to pointing out those prominent features in the act presented, which, in his opinion, make it incompatible with the constitution and sound policy. A general discussion will now take place, eliciting new light, and settling important principles; and a new Congress, elected in the midst of such discussion, and furnishing an equal representation of the people according to the last census, will bear to the Capitol the verdict of public opinion, and, I doubt not, bring this important question to a satisfactory result.

Under such circumstances, the bank comes forward and asks a renewal of its charter for a term of fifteen years, upon conditions which not only operate as a gratuity to the stockholders of many millions of dollars, but will sanction any abuses and legalize any encroachments. . . .

The bank is professedly established as an agent of the Executive branches of the Government, and its constitutionality is maintained on that ground. Neither upon the propriety of present action, nor upon the provisions of this act, was the Executive consulted. It has had no opportunity to say that it neither needs nor wants an agent clothed with such powers, and favored by such exemptions. There is nothing in its legitimate functions which make it necessary or proper. Whatever interest or influence, whether public or private, has given birth to this act, it cannot be found either in the wishes or necessities of the Executive Department, by which present action is deemed premature, and the powers conferred upon its agent not only unnecessary, but dangerous to the Government and country. . . .

I have now done my duty to my country. If sustained by my fellow-citizens, I shall be grateful and happy; if not, I shall find, in the motives which impel me, ample grounds for contentment and peace. In the difficulties which surround us, and the dangers which threaten our institutions, there is cause for neither dismay nor alarm. For relief and deliverance let us firmly rely on that kind Providence which, I am sure, watches with peculiar care over the destinies of our Republic, and on the intelligence and wisdom of our countrymen. Through *His* abundant goodness, and *their* patriotic devotion, our liberty and Union will be preserved.

117. *Henry Clay on the Veto Power.*¹

. . . On principle, certainly, the executive ought to have no agency in the formation of laws. Laws were the will of the nation authoritatively expressed. The carrying of those laws into effect was the duty which ought to be assigned to the executive, and this ought to be his sole duty, for it was an axiom in all free governments that the three great departments, legislative, executive, and judicial, should ever be kept separate and distinct. And a government was the most perfect when most in conformity with this fundamental principle. To give, then, to the executive, any agency in the ascertainment and expression of the will of the nation, was so far a violation of this great leading principle. But it was said that the framers of our Constitution had, nevertheless, been induced to place the veto upon the list of executive powers, by two considerations; the first was a desire to protect the executive against the power of the legislative branch, and the other was a prudent wish to guard the country against the injurious effects of crude and hasty legislation. But where was the necessity to protect the executive against the legislative department? Were not both bound by their solemn oaths, to support the Constitution? The judiciary had no veto. If the argument was a sound one, why was not the same protection extended

¹ In the Senate, January 24, 1842. Mallory, *Life and Speeches of Henry Clay*, II, 519-28 *passim*.

to the judiciary also? Was there not ample security against the encroachments of the legislative power, in the absence of the veto? First, there was the solemn oath of office; then there was the authority of the judiciary; then there was the responsibility of individual members to the people, and this responsibility continually kept up by a frequent appeal to the people; and, lastly, there was the ultimate conflict of the President and the legislature before the grand tribunal of the nation itself, in case of any attempt, by the legislature, to deprive him of the rightful exercise of his authority. . . .

He should confine himself to what might be called a mere numerical estimate of the amount of the veto power, and he would make this estimate by taking the numbers of the two houses of Congress, as those houses now stood. The Senate at present consisted of fifty-two members; of that number a majority consisted of twenty-seven; two thirds amounted to thirty-six. Supposing a law to be passed by a bare majority, (and in all great and contested questions bills were wont to be passed by very small majorities,) then there would be in its favor twenty-seven votes. The bill was submitted to the President, and returned by him with his veto. The force of the presidential veto could not be overturned but by thirty-six votes. Here, then, the veto in the hands of the President was equal in its effect upon legislation to nine senatorial votes. Mr. Clay dismissed all considerations of influence derived from his office, all the glitter and eclat of the President's high station, and all the persuasion directed to the interests of men by his vast patronage; all this he laid out of view, and looked merely at the numerical fact, that in the Senate the veto was equal to nine votes. And now in regard to the other branch. The House of Representatives consisted of two hundred and forty-two members; to constitute a majority required one hundred and twenty-two; two thirds amounted to one hundred and sixty-two. By looking at this difference, it would be seen, as in the case of the Senate, that the executive veto amounted in effect to forty representative votes. . . .

He contended, that practically, and in effect, the veto,

armed with such a qualification as now accompanied it in the Constitution, was neither more nor less than an absolute power. It was virtually an unqualified negative on the legislation of Congress. Not a solitary instance had yet occurred in which the veto once exerted had ever been overruled, nor was such a case likely to happen. In most questions where the veto could be exerted, there was always a considerable difference of opinion both in the country and in Congress as to the bill which had been passed. In such circumstances, when all the personal influence, the official patronage, and the reasoning which accompanied the veto, were added to the substantial weight of the veto itself, every man acquainted with human nature would be ready to admit, that if nothing could set it aside but a vote of two thirds in both houses, it might as well have been made absolute at once. . . .

. . . The veto power professed to act only while the legislature acted; then it was to terminate. Its effect was to be, to consummate legislation. The officer of government, in whose hands the Constitution placed a power so formidable, was supposed in theory to remain profoundly silent as to the passage of great measures of public policy, until they were presented to him in a finished form for his approbation and sanction.

This was the theory; but Mr. Clay contended, that really and in practice this veto power drew after it the power of initiating laws, and in its effect must ultimately amount to conferring on the executive the entire legislative power of the government. With the power to initiate and the power to consummate legislation, to give vitality and vigor to every law, or to strike it dead at his pleasure, the President must ultimately become the ruler of the nation. . . .

The actual condition of a President of the United States did not very widely differ from that of the monarchs of the old world. Here, too, the chief magistrate occupied an isolated station, where the voice of his country and the cries of its distress could not reach his ear. He, too, was surrounded by a cordon of favorites, flatterers, and fawns. Isolated in this district, with no embarrassments himself, the echoes of the pub-

lic distress, if they reached his ear at all, reached it with a faint and feeble sound, being obstructed by those who surrounded his person, and approached him only to flatter. Facts were boldly denied, and all complaints attributed to a factious spirit. Now, he would ask, was a man thus separated, and thus surrounded, more likely to know the real sufferings, wants, and wishes of his countrymen, than the two hundred and forty-two men in the other house, or the fifty-two men in this house, who came up here directly from their bosom, who shared in all their sufferings, who felt their wants, participated in their wishes, and sympathized with all their sorrows? That was the true question of the veto power. Now he thought if these things were duly considered, (and he spoke not of this or of that incumbent of the office, but of the circumstances of every one who filled it,) it must be admitted, by every candid mind, that the responsibility was great of a man who should undertake, on his own private opinion, to resist and suppress the will of the nation, constitutionally expressed. It was a power not merely to annul the national will, as lawfully uttered by its own chosen representatives; but the power to initiate legislation itself, and to substitute for the will of the nation an alien will, neither of the nation, nor of its representatives. . . .

118. *President Polk on the Exercise of the Veto Power.*¹

. . . The preservation of the Constitution from infraction is the President's highest duty. He is bound to discharge that duty at whatever hazard of incurring the displeasure of those who may differ with him in opinion. He is bound to discharge it as well by his obligations to the people who have clothed him with his exalted trust as by his oath of office, which he may not disregard. Nor are the obligations of the President in any degree lessened by the prevalence of views different from his own in one or both Houses of Congress. It is not alone hasty and inconsiderate legislation that he is required to check; but if at any time Congress shall, after apparently full deliberation,

¹ Annual Message, December 5, 1848. Richardson, *Messages and Papers of the Presidents*, IV, 662-65 *passim*.

resolve on measures which he deems subversive of the Constitution or of the vital interests of the country, it is his solemn duty to stand in the breach and resist them. The President is bound to approve or disapprove every bill which passes Congress and is presented to him for his signature. The Constitution makes this his duty, and he can not escape it if he would. . . .

Any attempt to coerce the President to yield his sanction to measures which he can not approve would be a violation of the spirit of the Constitution, palpable and flagrant, and if successful would break down the independence of the executive department and make the President, elected by the people and clothed by the Constitution with power to defend their rights, the mere instrument of a majority of Congress. . . .

The people, by the Constitution, have commanded the President, as much as they have commanded the legislative branch of the Government, to execute their will. They have said to him in the Constitution, which they require he shall take a solemn oath to support, that if Congress pass any bill which he can not approve "he shall return it to the House in which it originated with his objections." In withholding from it his approval and signature he is executing the will of the people, constitutionally expressed, as much as the Congress that passed it. . . .

If it be said that the Representatives in the popular branch of Congress are chosen directly by the people, it is answered, the people elect the President. If both Houses represent the States and the people, so does the President. The President represents in the executive department the whole people of the United States, as each member of the legislative department represents portions of them. . . .

In the exercise of the power of the veto the President is responsible not only to an enlightened public opinion, but to the people of the whole Union, who elected him, as the representatives in the legislative branches who differ with him in opinion are responsible to the people of particular States or districts, who compose their respective constituencies. . . .

CHAPTER XLII

THE PRESIDENT AS THE DIRECT REPRESENTATIVE OF THE PEOPLE

IN directing the Secretary of the Treasury to remove the public deposits from the Bank of the United States, President Jackson assumed a power of control over that officer which was promptly challenged as unprecedented by his opponents. The reasons actuating the President are set forth in the paper read to the Cabinet. It is important to note that the directive power thus asserted has made the President the effective head of the national administration. The course of President Jackson drew the heaviest fire which Whig leaders could direct upon him. After three months of cannonading, the Senate resolved "That the President, in the late executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both." President Jackson's reply, commonly known as the "Protest," is one of the most remarkable messages ever sent to the Senate.

119. *President Jackson's Paper read to the Cabinet.*¹

. . . The power of the secretary of the treasury over the deposits is *unqualified*. The provision that he shall report his reasons to congress, is no limitation. Had it not been inserted, he would have been responsible to congress, had he made a removal for any other than good reasons, and his responsibility now ceases, upon the rendition of sufficient ones to congress. The only object of the provision, is to make his reasons accessible to congress, and enable that body the more readily to judge of their soundness and purity, and thereupon to make such further provision by law as the legislative power may think proper in relation to the deposite of the public money. Those reasons may be very diversified. It was asserted by the secretary of the treasury without contradiction, as early as 1817, that he had power "to control the proceedings" of the bank of the United States at any moment, "by changing the deposits to the state banks," should it pursue an illiberal

¹ September 18, 1833. *Niles's Register*, XLV, 73-77 *passim*.

course towards those institutions; that "the secretary of the treasury will always be disposed to support the credit of the state banks, and will invariably direct transfers from the deposits of the public money in aid of their legitimate exertions to maintain their credit," and he asserted a right to employ the state banks when the bank of the United States should refuse to receive on deposit the notes of such state banks as the public interest required should be received in payment of the public dues. In several instances he did transfer the public deposits to state banks, in the immediate vicinity of branches, for reasons connected only with the safety of those banks, the public convenience and the interests of the treasury.

If it was lawful for Mr. Crawford, the secretary of the treasury at that time, to act on these principles, it will be difficult to discover any sound reason against the application of similar principles in still stronger cases. And it is a matter of surprise that a power which, in the infancy of the bank, was freely asserted as one of the ordinary and familiar duties of the secretary of the treasury, should now be gravely questioned, and attempts made to excite and alarm the public mind as if some new and unheard of power was about to be usurped by the executive branch of the government. . . .

It is for the wisdom of Congress to decide upon the best substitute to be adopted in the place of the bank of the United States; and the president would have felt himself relieved from a heavy and painful responsibility if in the charter of the bank, congress had reserved to itself the power of directing at its pleasure, the public money to be elsewhere deposited, and had not devolved that power exclusively on one of the executive departments. . . . But as the president presumes that the charter to the bank is to be considered as a contract on the part of the government, it is not now in the power of congress to disregard its stipulations; and by the terms of that contract the public money is to be deposited in the bank, during the continuance of its charter, unless the secretary of the treasury shall otherwise direct. Unless, therefore, the secretary of the treasury first acts, congress have no power over the subject,

for they cannot add a new clause to the charter or strike one out of it without the consent of the bank; and consequently the public money must remain in that institution to the last hour of its existence, unless the secretary of the treasury shall remove it at an earlier day.

The responsibility is thus thrown upon the executive branch of the government, of deciding how long before the expiration of the charter, the public interests will require the deposits to be placed elsewhere. . . . and it being the duty of one of the executive departments to decide in the first instance, subject to the future action of the legislative power, whether the public deposits shall remain in the bank of the United States until the end of its existence, or be withdrawn some time before, the president has felt himself bound to examine the question carefully and deliberately in order to make up his judgment on the subject: and in his opinion the near approach of the termination of the charter, and the public considerations heretofore mentioned, are of themselves amply sufficient to justify the removal of the deposits without reference to the conduct of the bank, or their safety in its keeping. . . .

In conclusion the president must be permitted to remark that he looks upon the pending question as of higher consideration than the mere transfer of a sum of money from one bank to another. Its decision may affect the character of our government for ages to come. Should the bank be suffered longer to use the public moneys, in the accomplishment of its purposes, with the proofs of its faithlessness and corruption before our eyes, the patriotic among our citizens will despair of success in struggling against its power; and we shall be responsible for entailing it upon our country forever. Viewing it as a question of transcendent importance, both in the principles and consequences it involves, the president could not, in justice to the responsibility which he owes to the country, refrain from pressing upon the secretary of the treasury, his view of the considerations which impel to immediate action. Upon him has been devolved by the constitution and the suffrages of the American people, the duty of superintending the operation

of the executive departments of the government, and seeing that the laws are faithfully executed. In the performance of this high trust, it is his undoubted right to express to those whom the laws and his own choice have made his associates in the administration of the government, his opinion of their duties under circumstances as they arise. It is this right which he now exercises. Far be it from him to expect or require, that any member of the cabinet should, at his request, order or dictation, do any act which he believes unlawful, or in his conscience condemns. From them and from his fellow citizens in general, he desires only that aid and support, which their reason approves and their conscience sanctions.

In the remarks he has made on this all important question, he trusts the secretary of the treasury will see only the frank and respectful declarations of the opinions which the president has formed on a measure of great national interest, deeply affecting the character and usefulness of his administration; and not a spirit of dictation, which the president would be as careful to avoid, as ready to resist. Happy will he be, if the facts now disclosed produce uniformity of opinion and unity of action among the members of the administration.

The president again repeats that he begs his cabinet to consider the proposed measure as his own, in the support of which he shall require no one of them to make a sacrifice of opinion or principle. Its responsibility has been assumed, after the most mature deliberation and reflection, as necessary to preserve the morals of the people, the freedom of the press and the purity of the elective franchise, without which all will unite in saying that the blood and treasure expended by our forefathers in the establishment of our happy system of government will have been vain and fruitless. Under these convictions, he feels that a measure so important to the American people cannot be commenced too soon; and he therefore names the first day of October next, as a period proper for the change of the deposits, or sooner, provided the necessary arrangements with the state banks can be made.

120. *President Jackson's "Protest."*¹

Under the constitution of the United States, the powers and functions of the various departments of the federal government, and their responsibilities for violation or neglect of duty, are clearly defined or result by necessary inference. The legislative power subject to the qualified negative of the president, is vested in the congress of the United States, composed of the senate and house of representatives. The executive power is vested exclusively in the president, except that in the conclusion of treaties and in certain appointments to office, he is to act with the advice and consent of the senate. The judicial power is vested exclusively in the supreme and other courts of the U. States, except in cases of impeachment, for which purpose the accusatory power is vested in the house of representatives, and that of hearing and determining in the senate. But although for the special purposes which have been mentioned, there is an occasional intermixture of the powers of the different departments, yet with these exceptions, each of the three great departments is independent of the others in its sphere of action; and when it deviates from that sphere is not responsible to the others, further than it is expressly made so in the constitution. In every other respect, each of them is the coequal of the other two, and all are the servants of the American people, without power or right to control or censure each other in the service of their common superior, save only in the manner and to the degree which that superior has prescribed. . . .

Tested by these principles, the resolution of the senate is wholly unauthorised by the constitution, and in derogation of its entire spirit. It assumes that a single branch of the legislative department may for the purposes of a public censure, and without any view to legislation or impeachment, take up, consider, and decide upon, the official acts of the executive. But in no part of the constitution is the president subjected to any such responsibility; and in no part of that instrument is

¹ Message to the Senate, April 15, 1834. Richardson, *Messages and Papers of the Presidents*, III, 69-93.

any such power conferred on either branch of the legislature. . . .

The resolution in question was introduced, discussed and passed, not as a joint, but as a separate resolution. It asserts no legislative power, proposes no legislative action; and neither possesses the form nor any of the attributes of a legislative measure. It does not appear to have been entertained or passed, with any view or expectation of its issuing in a law or joint resolution, or in the repeal of any law or joint resolution, or in any other legislative action.

Whilst wanting both the form and substance of a legislative measure, it is equally manifest, that the resolution was not justified by any of the executive powers conferred on the senate. These powers relate exclusively to the consideration of treaties and nominations to office; and they are exercised in secret session, and with closed doors. This resolution does not apply to any treaty or nomination, and was passed in a public session.

Nor does this proceeding in any way belong to that class of incidental resolutions which relate to the officers of the senate, to their chamber, and other appurtenances, or to subjects of order, and other matters of the like nature — in all which either house may lawfully proceed without any co-operation with the other, or with the president.

On the contrary the whole phraseology and sense of the resolution seem to be judicial. Its essence, true character, and only practical effect, are to be found in the conduct which it charges upon the president, and in the judgment which it pronounces on that conduct. The resolution therefore, though discussed and adopted by the senate in its legislative capacity, is, in its office, and in all its characteristics, essentially judicial. . . .

The resolution above quoted, charges in substance that in certain proceedings relating to the public revenue, the president has usurped authority and power not conferred upon him by the constitution and laws, and that in doing so he violated both. Any such act constitutes a high crime — one of the highest, indeed, which the president can commit — a crime which

justly exposes him to impeachment by the house of representatives, and upon due conviction, to removal from office, and to the complete and immutable disfranchisement prescribed by the constitution.

The resolution, then, was in substance an impeachment of the president; and in its passage amounts to a declaration by a majority of the senate, that he is guilty of an impeachable offence. As such it is spread upon the journals of the senate — published to the nation and to the world — made part of our enduring archives — and incorporated in the history of the age. The punishment of removal from office and future disqualification, does not, it is true, follow this decision; nor would it have followed the like decision, if the regular forms of proceeding had been pursued, because the requisite number did not concur in the result. But the moral influence of a solemn declaration, by a majority of the senate, that the accused is guilty of the offence charged upon him, has been as effectually secured, as if the like declaration had been made upon an impeachment expressed in the same terms. Indeed, a greater practical effect has been gained, because the votes given for the resolution, though not sufficient to authorise a judgment of guilty on an impeachment, were numerous enough to carry that resolution.

That the resolution does not expressly allege that the assumption of power and authority, which it condemns, was intentional and corrupt, is no answer to the preceding view of its character and effect. The act thus condemned, necessarily implies volition and design in the individual to whom it is imputed, and being unlawful in its character, the legal conclusion is, that it was prompted by improper motives, and committed with an unlawful intent. The charge is not of a mistake in the exercise of supposed powers, but of the assumption of powers not conferred by the constitution and laws, but in derogation of both, and nothing is suggested to excuse or palliate the turpitude of the act. In the absence of any such excuse, or palliation, there is room only for one inference; and that is, that the intent was unlawful and corrupt. Besides, the resolu-

tion not only contains no mitigating suggestion, but on the contrary, it holds up the act complained of as justly obnoxious to censure and reprobation: and thus as distinctly stamps it with impurity of motive, as if the strongest epithets had been used.

The president of the United States, therefore, has been by a majority of his constitutional triers, accused and found guilty of an impeachable offence: but in no part of this proceeding have the directions of the constitution been observed. . . .

The honest differences of opinion which occasionally exist between the senate and the president, in regard to matters in which both are obliged to participate, are sufficiently embarrassing. But if the course recently adopted by the senate shall hereafter be frequently pursued, it is not only obvious that the harmony of the relations between the president and the senate will be destroyed, but that other and graver effects will ultimately ensue. If the censures of the senate be submitted to by the president, the confidence of the people in his ability and virtue, and the character and usefulness of his administration, will soon be at an end, and the real power of the government will fall into the hands of a body, holding their offices for long terms, not elected by the people, and not to them directly responsible. If, on the other hand, the illegal censures of the senate should be resisted by the president, collisions and angry controversies might ensue, discreditable in their progress, and in the end compelling the people to adopt the conclusion, either that their chief magistrate was unworthy of their respect, or that the senate was chargeable with calumny and injustice. Either of these results would impair public confidence in the perfection of the system, and lead to serious alterations of its frame work, or to the practical abandonment of some of its provisions.

The influence of such proceedings on the other departments of the government, and more especially on the states, could not fail to be extensively pernicious. When the judges in the last resort of official misconduct themselves overleap the bounds of their authority, as prescribed by the constitution,

what general disregard of its provisions might not their example be expected to produce? And who does not perceive that such contempt of the federal constitution, by one of its most important departments, would hold out the strongest temptation to resistance on the part of the state sovereignties, whenever they shall suppose their just rights to have been invaded? Thus all the independent departments of the government, and the states which compose our confederated union, instead of attending to their appropriate duties, and leaving those who may offend, to be reclaimed or punished in the manner pointed out in the constitution, would fall to mutual crimination and recrimination, and give to the people confusion and anarchy, instead of order and law; until at length some form of aristocratic power would be established on the ruins of the constitution, or the states be broken into separate communities.

Far be it from me to charge, or to insinuate, that the present senate of the United States intend, in the most distant way, to encourage such a result. It is not of their motives or designs, but only of the tendency of their acts, that it is my duty to speak. It is, if possible, to make senators themselves sensible of the danger which lurks under the precedent set in their resolution, and at any rate to perform my duty, as the responsible head of one of the coequal departments of the government, that I have been compelled to point out the consequences to which the discussion and passage of the resolution may lead, if the tendency of the measure be not checked in its inception.

It is due to the high trust with which I have been charged; to those who may be called to succeed me in it; to the representatives of the people, whose constitutional prerogative has been unlawfully assumed; to the people of the states; and to the constitution they have established; that I should not permit its provisions to be broken down by such an attack on the executive department, without at least some effort "to preserve, protect, and defend them." With this view, and for the reasons which have been stated, I do hereby **SOLEMNLY PROTEST** against the aforementioned proceedings of the senate, as unauthorized by the constitution; contrary to its spirit and to

several of its express provisions; subversive of that distribution of the powers of government which it has ordained and established; destructive of the checks and safeguards by which those powers were intended, on the one hand, to be controlled, and on the other to be protected; and calculated by their immediate and collateral effects, by their character and tendency, to concentrate in the hands of a body not directly amenable to the people, a degree of influence and power dangerous to their liberties, and fatal to the constitution of their choice. . . .

121. *Daniel Webster on the "Protest."*¹

. . . The first proposition, then, which the Protest asserts, in regard to the President's powers as executive magistrate, is, that, the general duty being imposed on him by the Constitution, of taking care that the laws be faithfully executed, he thereby becomes himself responsible for the conduct of every person employed in the government; "for the entire action," as the paper expresses it, "of the executive department." This, Sir, is very dangerous logic. I reject the inference altogether. No such responsibility, nor any thing like it, follows from the general provision of the Constitution, making it his duty to see the laws executed. If it did, we should have, in fact, but one officer in the whole government. The President would be everybody. And the Protest assumes to the President this whole responsibility for every other officer, for the very purpose of making the President everybody, of annihilating every thing like independence, responsibility, or character, in all other public agents. The whole responsibility is assumed, in order that it may be more plausibly argued that all officers of government are, not agents of the law, but the President's agents, and therefore responsible to him alone. If he be responsible for the conduct of all officers, and they be responsible to him only, then it may be maintained that such officers are but his own agents, his substitutes, his deputies. The first thing to be done, therefore, is to assume the respon-

¹ In the Senate, May 7, 1834. *Works of Daniel Webster* (1851), iv, 136-45 *passim*.

sibility for all; and this, you will perceive, Sir, is done, in the fullest manner, in the passages which I have read. Having thus assumed for the President the entire responsibility of the whole government, the Protest advances boldly to its conclusion, and claims, at once, absolute power over all individuals in office, as being merely the President's agents. This is the language: "The whole executive power being vested in the President, who is responsible for its exercise, it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the performance of his duties, and to discharge them when he is no longer willing to be responsible for their acts."

/ This, Sir, completes the work. This handsomely rounds off the whole executive system of executive authority. First, the President has the whole responsibility; and then, being thus responsible for all, he has, and ought to have, the whole power. We have heard of political units, and our American executive, as here represented, is indeed a unit. We have a charmingly simple government! Instead of many officers, in different departments, each having appropriate duties and each responsible for his own duties, we are so fortunate as to have to deal with but one officer. The President carries on the government; all the rest are but sub-contractors. Sir, whatever name we give him, we have but One Executive Officer. A Briareus sits in the centre of our system, and with his hundred hands touches every thing, moves every thing, controls every thing. I ask, Sir, Is this republicanism? Is this a government of laws? Is this legal responsibility? . . .

Sir, it exceeds human belief that any man should put sentiments such as this paper contains into a public communication from the President to the Senate. They are sentiments which give us all one master. The Protest asserts an absolute right to remove all persons from office at pleasure; and for what reason? Because they are incompetent? Because they are incapable? Because they are remiss, negligent, or inattentive? No, Sir; these are not the reasons. But he may discharge them, one and all, simply because "he is no longer willing to be

responsible for their acts"! It insists on an absolute right in the President to direct and control every act of every officer of the government, except the judges. It asserts this right of direct control over and over again. The President may go into the treasury, among the auditors and comptrollers, and direct them how to settle every man's account; what abatements to make from one, what additions to another. He may go into the custom-house, among collectors and appraisers, and may control estimates, reductions, and appraisements. It is true that these officers are sworn to discharge the duties of their respective offices honestly and fairly, according to their own best abilities; it is true, that many of them are liable to indictment for official misconduct, and others responsible, in suits of individuals, for damages and penalties, if such official misconduct be proved; but notwithstanding all this, the Protest avers that all these officers are but the President's agents; that they are but aiding him in the discharge of his duties; that he is responsible for their conduct, and that they are removable at his will and pleasure. And it is under this view of his own authority that the President calls the Secretaries his Secretaries, not once only, but repeatedly. . . .

Connected, Sir, with the idea of this airy and unreal responsibility to the public is another sentiment, which of late we hear frequently expressed; and that is, that the President is the direct representative of the American people. This is declared in the Protest in so many words. "The President," it says, "is the direct representative of the American people." Now, Sir, this is not the language of the Constitution. The Constitution nowhere calls him the representative of the American people; still less, their direct representative. It could not do so with the least propriety. He is not chosen directly by the people, but by a body of electors, some of whom are chosen by the people, and some of whom are appointed by the State legislature. Where, then, is the authority for saying that the President is the direct representative of the people? The Constitution calls the members of the other house Representatives, and declares that they shall be chosen by the people; and there are no

other direct or immediate representatives of the people in this government. The Constitution denominates the President simply the President of the United States; it points out the complex mode of electing him, defines his powers and duties, and imposes limits and restraints on his authority. With these powers and duties, and under these restraints, he becomes, when chosen, President of the United States. That is his character, and the denomination of his office. How is it, then, that, on this official character, thus cautiously created, limited, and defined, he is to engraft another and a very imposing character, namely, the character of the direct representative of the American people? I hold this, Sir, to be mere assumption, and dangerous assumption. If he is the representative of all the American people, he is the only representative which they all have. Nobody else presumes to represent all the people. And if he may be allowed to consider himself as the Sole Representative Of All The American People, and is to act under no other responsibility than such as I have already described, then I say, Sir, that the government (I will not say the people) has already a master. . . .

CHAPTER XLIII

PRESIDENTIAL INITIATIVE IN DETERMINING FOREIGN POLICY

ALTHOUGH President Polk's war message is substantially correct in its account of Slidell's mission, certain important details are slurred over and somewhat blurred. It is noteworthy that, though Slidell was dispatched to Mexico in November, his appointment was not confirmed by the Senate until January 20; that on January 12 a dispatch was received from Slidell which made it probable, if not certain, that he would not be received by the Mexican Government; and that on the following day the President sent orders to General Taylor to advance to the Rio Grande. It is difficult to resist the conclusion that the President desired to force the hand of Mexico and that the alleged threatened invasion of Texas by Mexican forces was no more imminent then than weeks before. These and other neglected considerations gave point to Stephens's attack upon "Polk the Mendacious." The following extracts from presidential messages indicate the novel powers assumed by the President during the interesting process of "conquering a peace."

122. *President Polk's War Message.*¹

. . . The strong desire to establish peace with Mexico on liberal and honorable terms, and the readiness of this government to regulate and adjust our boundary, and other causes of difference with that power, on such fair and equitable principles as would lead to permanent relations of the most friendly nature, induced me in September last to seek the reopening of diplomatic relations between the two countries. . . . An envoy of the United States repaired to Mexico, with full powers to adjust every existing difference. . . .

It now becomes my duty to state more in detail the origin, progress, and failure of that mission. In pursuance of the instructions given in September last, an inquiry was made, on the 13th of October, 1845, in the most friendly terms, through our consul in Mexico, of the minister for foreign affairs, whether the Mexican government "would receive an envoy from the United

¹ Richardson, *Messages and Papers of the Presidents*, IV, 437-43 *passim*.

States intrusted with full powers to adjust all the questions in dispute between the two governments;" with the assurance that "should the answer be in the affirmative, such an envoy would be immediately despatched to Mexico." The Mexican minister, on the 15th of October, gave an affirmative answer to this inquiry, requesting, at the same time, that our naval force at Vera Cruz might be withdrawn, lest its continued presence might assume the appearance of menace and coercion pending the negotiations. This force was immediately withdrawn. On the 10th of November, 1845, Mr. John Slidell, of Louisiana, was commissioned by me as envoy extraordinary and minister plenipotentiary of the United States to Mexico, and was intrusted with full powers to adjust both the questions of the Texas boundary and of indemnification to our citizens. The redress of the wrongs of our citizens naturally and inseparably blended itself with the question of boundary. The settlement of the one question, in any correct view of the subject, involves that of the other. I could not, for a moment, entertain the idea that the claims of our much injured and long suffering citizens, many of which had existed for more than twenty years, should be postponed, or separated from the settlement of the boundary question.

[After setting forth Slidell's endeavors to secure recognition from Herrera and upon his overthrow, from Paredes, the message continues:]

Under these circumstances, Mr. Slidell, in obedience to my direction, addressed a note to the Mexican minister of foreign relations, under date of the 1st of March last, asking to be received by that government in the diplomatic character to which he had been appointed. This minister, in his reply under date of the 12th of March, reiterated the arguments of his predecessor, and, in terms that may be considered as giving just grounds of offence to the government and people of the United States, denied the application of Mr. Slidell. Nothing, therefore, remained for our envoy but to demand his passports, and return to his own country. . . .

In my message at the commencement of the present session,

I informed you that, upon the earnest appeal both of the congress and convention of Texas, I had ordered an efficient military force to take a position "between the Nueces and the Del Norte." This had become necessary, to meet a threatened invasion of Texas by the Mexican forces, for which extensive military preparations had been made. The invasion was threatened solely because Texas had determined, in accordance with a solemn resolution of the Congress of the United States, to annex herself to our Union; and, under these circumstances, it was plainly our duty to extend our protection over her citizens and soil.

This force was concentrated at Corpus Christi, and remained there until after I had received such information from Mexico as rendered it probable, if not certain, that the Mexican government would refuse to receive our envoy.

Meantime Texas, by the final action of our Congress, had become an integral part of our Union. The Congress of Texas, by its act of December 19, 1836, had declared the Rio del Norte to be the boundary of that republic. Its jurisdiction had been extended and exercised beyond the Nueces. The country between that river and the Del Norte had been represented in the congress and in the convention of Texas; had thus taken part in the act of annexation itself; and is now included within one of our congressional districts. Our own Congress had, moreover, with great unanimity, by the act approved December 31, 1845, recognised the country beyond the Nueces as a part of our territory, by including it within our own revenue system; and a revenue officer, to reside within that district, has been appointed, by and with the advice and consent of the senate. It became, therefore, of urgent necessity to provide for the defence of that portion of our country. Accordingly, on the 13th of January last, instructions were issued to the general in command of these troops to occupy the left bank of the Del Norte. . . .

The army moved from Corpus Christi on the 11th of March, and on the 28th of that month arrived on the left bank of the Del Norte, opposite to Matamoras, where it encamped on a

commanding position, which has since been strengthened by the erection of field works. A depot has also been established at Point Isabel, near the Brazos Santiago, thirty miles in rear of the encampment. The selection of his position was necessarily confided to the judgment of the general in command.

The Mexican forces at Matamoras assumed a belligerent attitude, and, on the 12th of April, General Ampudia, then in command, notified General Taylor to break up his camp within twenty-four hours, and to retire beyond the Nueces river, and, in the event of his failure to comply with these demands, announced that arms, and arms alone, must decide the question. But no open act of hostility was committed until the 24th of April. On that day, General Arista, who had succeeded to the command of the Mexican forces, communicated to General Taylor that "he considered hostilities commenced, and should prosecute them." A party of dragoons, of sixty-three men and officers, were on the same day despatched from the American camp up the Rio del Norte, on its left bank, to ascertain whether the Mexican troops had crossed, or were preparing to cross, the river, "became engaged with a large body of these troops, and, after a short affair, in which some sixteen were killed and wounded, appear to have been surrounded and compelled to surrender."

The grievous wrongs perpetrated by Mexico upon our citizens throughout a long period of years remain unredressed; and solemn treaties, pledging her public faith for this redress, have been disregarded. A government either unable or unwilling to enforce the execution of such treaties, fails to perform one of its plainest duties.

Our commerce with Mexico has been almost annihilated. It was formerly highly beneficial to both nations; but our merchants have been deterred from prosecuting it by the system of outrage and extortion which the Mexican authorities have pursued against them, whilst their appeals through their own government for indemnity have been made in vain. Our forbearance has gone to such an extreme as to be mistaken in its character. Had we acted with vigor in repelling the insults and

redressing the injuries inflicted by Mexico at the commencement, we should doubtless have escaped all the difficulties in which we are now involved.

Instead of this, however, we have been exerting our best efforts to propitiate her good-will. Upon the pretext that Texas, a nation as independent as herself, thought proper to unite its destinies with our own, she has affected to believe that we have severed her rightful territory, and in official proclamations and manifestoes has repeatedly threatened to make war upon us, for the purpose of reconquering Texas. In the meantime, we have tried every effort at reconciliation. The cup of forbearance had been exhausted, even before the recent information from the frontier of the Del Norte. But now, after reiterated menaces, Mexico has passed the boundary of the United States, has invaded our territory, and shed American blood upon the American soil. She has proclaimed that hostilities have commenced, and that the two nations are now at war.

As war exists, and, notwithstanding all our efforts to avoid it, exists by the act of Mexico herself, we are called upon by every consideration of duty and patriotism to vindicate with decision the honor, the rights, and the interests of our country. . . .

In further vindication of our rights, and defence of our territory, I invoke the prompt action of Congress to recognise the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace. . . .

123. *A Whig View of the Origin of the War.*¹

My first proposition is, that the immediate cause of hostilities between our army and the Mexican forces, was the advance movement from Corpus Christi, upon the Nueces river, to Matamoras, upon the Rio Grande or Del Norte. And, to sustain this, I need but refer to the history of the case, given by the President himself in the documents accompanying his message to the House, when he asked us to recognize a state of

¹ Speech of Representative Stephens in the House, June 16, 1846. Cleveland, *Alexander H. Stephens*, 304-16 *passim*.

war with Mexico; a singular request, by-the-by, for the President to make, when the Constitution gives Congress the sole power to declare war. Perhaps some gentlemen may suppose that that clause in the Constitution simply means that when the President gets us into war, it is the business of Congress then to make it known — to declare it — or recognize the fact. This, however, is not my understanding of it. Congress alone has the right and power to engage in war. The President has the right to repel hostilities; but not by his policy with other nations to bring on and involve the country in a war without consultation with Congress. . . .

. . . I come now to say, what I fearlessly assert, that the President had no right, no power, legally, to order the military occupation of the disputed territory on the Rio Grande without authority from Congress. He had no right or power to send the army beyond that country over which Texas had established her jurisdiction. The boundary between Texas and Mexico — I mean Texas as an independent State after her revolution — was never settled. Before the revolution the river Nueces was the southern boundary of the department of Texas. Between that river and the Rio Grande lay the districts of Tamaulipas, Coahuila, and others. During and after the revolution, a portion of this country on the south of the Nueces, about Corpus Christi, went with Texas and adhered to the new government; the other portion, lying on the Rio Grande, adhered to the old government; and though Texas, after her declaration, defined her boundary to be the Rio Grande, yet she never successfully established her jurisdiction to that extent. Between Corpus Christi and the Mexican settlements on the Rio Grande is an immense desert or waste, where nobody lives. The first settlements to the south of that unoccupied region are on the Rio Grande, or near it, and have continued subject to the laws of Mexico. The people are Mexicans or Spaniards. . . .

But it is useless to multiply authority upon this point. All this was well known at the time of the passage of the resolution of annexation; and hence the resolution was guarded so as to cover only so much territory as was "*properly included within*,

and rightfully belonged to the Republic of Texas," reserving the question of boundary to be settled and adjusted between this government and Mexico by *negotiation, and not by arms*; and Congress positively refused to pass any measure of that sort which fixed the boundary at the Rio Grande or Del Norte; and I venture to say that no resolution so fixing the boundary could have passed this or the other House. And now what I have got to say is this: Congress having failed to establish a boundary in that quarter, the President could not undertake to do it. The limits or boundaries of a country can be fixed in two ways only: one is by negotiation, and the other is by the sword. The President by himself can do neither. He may make the initiative in the former case; but Congress can alone constitutionally draw the sword for any purpose. I grant, if Mexico would not negotiate, would not treat, would not come to any understanding in a friendly manner where the dividing line should be, where their jurisdiction should end and ours commence, that we would then have a right to make a limit for ourselves, and a right, by force of arms, to establish that limit or line. But, sir, this is a right that Congress only can constitutionally exercise. The President cannot do it. . . .

. . . But some one asks me what was the President to do? How was he to know where to stop, as there was no fixed line? I answer, his duty was a plain one. It was to keep the army within that portion of the territory which "*rightfully belonged to Texas,*" or over which she had established her jurisdiction and supremacy, where her laws extended and were enforced, and where the people acknowledged her government. Whether that was east or west of the Nueces made no difference. But he had no authority to order them beyond such limits. . . .

124. *President Polk to Congress.*¹

It is well known that the only indemnity which it is in the power of Mexico to make in satisfaction of the just and long-deferred claims of our citizens against her and the only means

¹ December 7, 1847. Richardson, *Messages and Papers of the Presidents*, IV, 536-38.

by which she can reimburse the United States for the expenses of the war is a cession to the United States of a portion of her territory. Mexico has no money to pay, and no other means of making the required indemnity. If we refuse this, we can obtain nothing else. To reject indemnity by refusing to accept a cession of territory would be to abandon all our just demands, and to wage the war, bearing all its expenses, without a purpose or definite object.

A state of war abrogates treaties previously existing between the belligerents and a treaty of peace puts an end to all claims for indemnity for tortious acts committed under the authority of one government against the citizens or subjects of another unless they are provided for in its stipulations. A treaty of peace which would terminate the existing war without providing for indemnity would enable Mexico, the acknowledged debtor and herself the aggressor in the war, to relieve herself from her just liabilities. By such a treaty our citizens who hold just demands against her would have no remedy either against Mexico or their own Government. Our duty to these citizens must forever prevent such a peace, and no treaty which does not provide ample means of discharging these demands can receive my sanction.

A treaty of peace should settle all existing differences between the two countries. If an adequate cession of territory should be made by such a treaty, the United States should release Mexico from all her liabilities and assume their payment to our own citizens. If instead of this the United States were to consent to a treaty by which Mexico should again engage to pay the heavy amount of indebtedness which a just indemnity to our Government and our citizens would impose on her, it is notorious that she does not possess the means to meet such an undertaking. From such a treaty no result could be anticipated but the same irritating disappointments which have heretofore attended the violations of similar treaty stipulations on the part of Mexico. Such a treaty would be but a temporary cessation of hostilities, without the restoration of the friendship and good understanding which should characterize the future intercourse between the two countries.

That Congress contemplated the acquisition of territorial indemnity when that body made provision for the prosecution of the war is obvious. Congress could not have meant when, in May, 1846, they appropriated \$10,000,000 and authorized the President to employ the militia and naval and military forces of the United States and to accept the services of 50,000 volunteers to enable him to prosecute the war, and when, at their last session, and after our Army had invaded Mexico, they made additional appropriations and authorized the raising of additional troops for the same purpose, that no indemnity was to be obtained from Mexico at the conclusion of the war; and yet it was certain that if no Mexican territory was acquired no indemnity could be obtained. It is further manifest that Congress contemplated territorial indemnity from the fact that at their last session an act was passed, upon the Executive recommendation, appropriating \$3,000,000 with that express object. This appropriation was made "to enable the President to conclude a treaty of peace, limits, and boundaries with the Republic of Mexico, to be used by him in the event that said treaty, when signed by the authorized agents of the two Governments and duly ratified by Mexico, shall call for the expenditure of the same or any part thereof." The object of asking this appropriation was distinctly stated in the several messages on the subject which I communicated to Congress. Similar appropriations made in 1803 and 1806, which were referred to, were intended to be applied in part consideration for the cession of Louisiana and the Floridas. In like manner it was anticipated that in settling the terms of a treaty of "limits and boundaries" with Mexico a cession of territory estimated to be of greater value than the amount of our demands against her might be obtained, and that the prompt payment of this sum in part consideration for the territory ceded, on the conclusion of a treaty and its ratification on her part, might be an inducement with her to make such a cession of territory as would be satisfactory to the United States; and although the failure to conclude such a treaty has rendered it unnecessary to use any part of the \$3,000,000 appropriated by that act, and the entire

sum remains in the Treasury, it is still applicable to that object should the contingency occur making such application proper.

The doctrine of no territory is the doctrine of no indemnity, and if sanctioned would be a public acknowledgment that our country was wrong and that the war declared by Congress with extraordinary unanimity was unjust and should be abandoned — an admission unfounded in fact and degrading to the national character. . . .

125. *President Polk to the House of Representatives.*¹

In answer to the resolutions of the House of Representatives of the 10th instant, requesting information in relation to New Mexico and California, I communicate herewith reports from the Secretary of State, the Secretary of the Treasury, the Secretary of War, and the Secretary of the Navy, with the documents which accompany the same. These reports and documents contain information upon the several points of inquiry embraced by the resolutions. . . .

The resolutions request information in regard to the existence of civil governments in New Mexico and California, their "form and character," by "whom instituted," by "what authority," and how they are "maintained and supported." . . .

The temporary governments authorized were instituted by virtue of the rights of war. The power to declare war against a foreign country, and to prosecute it according to the general laws of war, as sanctioned by civilized nations, it will not be questioned, exists under our Constitution. When Congress has declared that war exists with a foreign nation, "the general laws of war apply to our situation," and it becomes the duty of the President, as the constitutional "Commander in Chief of the Army and Navy of the United States," to prosecute it.

In prosecuting a foreign war thus duly declared by Congress, we have the right, by "conquest and military occupation," to acquire possession of the territories of the enemy, and, during the war, to "exercise the fullest rights of sovereignty over it."

¹ July 24, 1848. Richardson, *Messages and Papers of the Presidents*, IV, 594-96 *passim*.

The Sovereignty of the enemy is in such case "suspended," and his laws can "no longer be rightfully enforced" over the conquered territory "or be obligatory upon the inhabitants who remain and submit to the conqueror. By the surrender the inhabitants pass under a temporary allegiance" to the conqueror, and are "bound by such laws, and such only, as" he may choose to recognize and impose. "From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience." These are well-established principles of the laws of war, as recognized and practised by civilized nations, and they have been sanctioned by the highest judicial tribunal of our own country.

The orders and instructions issued to the officers of our Army and Navy, applicable to such portions of the Mexican territory as had been or might be conquered by our arms, were in strict conformity to these principles. . . .

It is from the same source of authority that we derive the unquestioned right, after the war has been declared by Congress, to blockade the ports and coast of the enemy, to capture his towns, cities, and provinces, and to levy contributions upon him for the support of our Army. Of the same character with these is the right to subject to our temporary military government the conquered territories of our enemy. They are all belligerent rights, and their exercise is as essential to the successful prosecution of a foreign war as the right to fight battles.

New Mexico and Upper California were among the territories conquered and occupied by our forces, and such temporary governments were established over them. They were established by the officers of our Army and Navy in command, in pursuance of the orders and instructions accompanying my message to the House of Representatives of December 22, 1846. . . .

On the conclusion and exchange of ratifications of a treaty of peace with Mexico, which was proclaimed on the 4th instant, these temporary governments necessarily ceased to exist. . . .

126. *President Polk to Congress.*¹

Upon the exchange of ratifications of the treaty of peace with Mexico, on the 30th of May last, the temporary governments which had been established over New Mexico and California by our military and naval commanders by virtue of the rights of war ceased to derive any obligatory force from that source of authority, and having been ceded to the United States, all government and control over them under the authority of Mexico had ceased to exist. Impressed with the necessity of establishing Territorial governments over them, I recommended the subject to the favorable consideration of Congress in my message communicating the ratified treaty of peace, on the 6th of July last, and invoked their action at that session. Congress adjourned without making any provision for their government. The inhabitants by the transfer of their country had become entitled to the benefit of our laws and Constitution, and yet were left without any regularly organized government. Since that time the very limited power possessed by the Executive has been exercised to preserve and protect them from the inevitable consequences of a state of anarchy. The only government which remained was that established by the military authority during the war. Regarding this to be a *de facto* government, and that by the presumed consent of the inhabitants it might be continued temporarily, they were advised to conform and submit to it for the short intervening period before Congress would again assemble and could legislate on the subject. . . .

¹ December 5, 1848. Richardson, *Messages and Papers of the Presidents*, IV, 638.

PART SEVEN. SLAVERY AND THE CONSTITUTION

CHAPTER XLIV

SLAVERY IN THE TERRITORIES

FROM the beginning of the war, the acquisition of territory from Mexico, whether as indemnity or conquest, was earnestly desired by the administration at Washington. The prospect opened up long vistas of trouble. With every extension of territory the slavery question was bound to recur. President Polk's request for an appropriation for any cession of territory which Mexico might make as "indemnity," was the signal for an aggressive move on the part of the anti-slavery forces. Should such an accession of territory fall to the United States, they were bound that it should be made free soil. To this end they attached the Wilmot Proviso to successive bills authorizing the desired appropriation. The House favored the Proviso, but the Senate would have none of it. Between 1847 and 1850 at least four different ways of dealing with the vexing question of slavery in the territories were proposed. One was presented by the South Carolina radicals led by Calhoun and Rhett; a second was reported by a committee of which Senator Clayton of Delaware was chairman; a third was offered by Cass and promptly dubbed "squatter sovereignty"; and a fourth was finally embodied in the Utah and New Mexico Territorial bills of 1850.

127. *The Wilmot Proviso.*¹

Provided, That, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, by virtue of any treaty which may be negotiated between them, and to the use by the Executive of the moneys herein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall first be duly convicted. . . .

¹ Proposed by Representative Wilmot of Pennsylvania, August 8, 1846, as an amendment to the Two Million Dollar Bill.

128. *The Rhett-Calhoun Doctrine.*¹

The question made by the bill is, has Congress the power of excluding the people of the southern States from entering and colonizing with their slaves the territories of the United States? The gentleman from Indiana, [Mr. Pettit,] and others, affirm that it has, because the sovereignty of the Territories is in the Government of the United States. . . .

Now, let us examine, first, before we ascend to general principles, the clause of the Constitution, on which the gentleman from Indiana relies, to show that sovereignty over the territories, is in the Government of the United States. "The Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States." Here, in the first place, nothing is said about *the Government* of the United States. Whatever power is conceded by the clause is conceded to "*the Congress.*" . . . Suppose Congress to be the Government, what power does the clause convey? "To dispose of, and make all *needful* rules and regulations concerning, the territory or other property belonging to the United States." Does the power "to dispose of and make all needful rules and regulations," imply sovereignty? Mark, sir, how far short this phraseology is in its scope of that other clause in the Constitution which relates to "the other property" of the United States — the forts, arsenals, magazines, and dock yards. Over these, and over this District, Congress "is to exercise *exclusive* legislation *in all cases whatsoever.*" Does not the clause relate to the territory only as property, and confer only powers necessary for its disposition and control as property? It speaks of the territories in connexion with the "other property" of the United States. Congress can sell the lands lying within the territory, and, to secure purchasers and settlers in their persons and property, they can make "all needful rules and regu-

¹ Speech of Representative Rhett in the House, January 15, 1847. *Congressional Globe*, 29 Cong., 2 Sess., App., 244-46 *passim*. The resolutions of Calhoun, to the same purport, are in the *Congressional Globe*, 29 Cong., 2 Sess., 455.

lations," establish territorial governments, and pass laws. . . . But the clause itself directly repudiates the idea that either Congress or the Government have any property, much less sovereignty over our territories. Its words are, "territory and other property *belonging to the United States.*" Here is a direct affirmation that our territory does not "*belong*" either to Congress or the Government. Now, although it does not follow that where there is property (for property may belong to individuals) there is sovereignty; yet where there is no property, over an unsettled country, there cannot be sovereignty. The "supreme ultimate authority" cannot exist where there is neither the inferior right of property, which exists in individuals, or the higher right by the eminent domain. The clause, however, does not stop at negating, by implication, the idea that the Government has the sovereignty over our territories, but it directly asserts where the property and the sovereignty over them are — "*belonging to the United States.*" . . .

It declares, that the territories belong to the United States. They are tenants in common, or joint proprietors, and co-sovereigns over them. As co-sovereigns they have agreed, in their common compact, the Constitution, that their agent, the General Government, "may dispose of, and make all needful rules and regulations," with respect to them; but, beyond this, they are not limited or limitable in their rights. Their sovereignty, unalienated and unimpaired by this mutual concession to each other, exists in all its plenitude over our territories; as much so, as within the limits of the States themselves. Yet there can be no conflict; for none of the States can make any "rules and regulations" separately, within the territories, which may bring them in conflict. The "rules and regulations" prevailing, will be made by all, and obligatory on all, through their common agency, the Government of the United States. The only effect, and probably the only object of their reserved sovereignty, is, that it secures to each State the right to enter the territories with her citizens, and settle and occupy them with their property — with whatever is recognised as property by each State. The ingress of the citizen, is the ingress of his

sovereign, who is bound to protect him in his settlement. It matters not, whether he carries those who are slaves or not. He is not responsible to any of the co-sovereigns, for the nature of this property. That is an affair between him and his State. Nor can the other States have any just ground of complaint, because the southern States occupy a portion of the territory common to them with their slaves. Did not this institution exist, when they made the compact of union with them? Will not every foot of territory acquired be purchased by their common blood or treasure? And do they not know, that the southern States must enter it with their slaves, or not at all? Nay, more, that in vast regions, where the Anglo-Saxon race cannot cultivate the soil, they must be cultivated by a southern planter, or be left a wilderness? In exercising a common right over a common property, the southern States only do what the other States have also a right to do, without giving any just cause for pleading surprise or injustice. But it will be a surprise — it will be a strange injustice, if a portion of the States, whether free or slave, shall presume to set up their will as supreme over the territories, and through Congress, or any other instrumentality, shall attempt to exclude any of these co-States from possessing and colonizing them. This would practically be to assert, that the sovereignty over the territories is not in all the States, but in the excluding portion only. . . .

129. *The Law of the Acquired Territories.*¹

To be understood more clearly, I will read the terms of the bill itself, so far as it relates to slavery in New Mexico and California. It will be seen that all legislation by the Territorial Governments “respecting the prohibition or establishment of African slavery” was to be prohibited; and all questions relating to titles to slaves there, or their right to freedom, was to be left ultimately to the decision of the Supreme Court of the United States. . . .

¹ Representative Stephens on the Clayton Compromise, August 7, 1848. *Congressional Globe*, 30 Cong., 1 Sess., App., 1104-06 *passim*.

The bill contains nothing else which bears materially upon the subject of slavery. It merely prohibits the Territorial Government from passing any law upon the subject; and leaves the southern man, who may be inclined to go there with his slaves, to contest his rights to the best of his abilities with the courts of the Territory in the first instance, and then, if he chooses, with the Supreme Court of the Union. . . .

I set out, then, by stating, that according to the best, ablest, and most approved writers on public law, and according to the decision of the courts in England in analogous cases, and according to the repeated decisions of our own Supreme Court, to which this bill proposed to refer this matter, (in the absence of such legislation as I have alluded to,) the law by which the courts would decide questions of slavery there is the law which was in force in New Mexico and California upon that subject at the time of the conquest. . . .

For this purpose I refer, first, to the opinion given by Chief Justice Marshall in the case of the American Insurance Company *et al. vs. Canter*, 1st Peters, 542. In this case that learned judge used the following language: [See No. 73 above.]

But, sir, this principle has been repeatedly decided by the same tribunal. I have another case before me, in 12 Peters' Reports, page 410, in which the same doctrine is held, and a long list of cases cited, in which it is also affirmed. This is the case of *Strother vs. Lucas*. . . .

Here, again, is a clear and distinct recognition of the same principle, with the declaration that the "laws, whether in writing or evidenced by the usage and custom of the conquered or ceded country, continue in force till altered by the new sovereign." . . .

And now, Mr. Speaker, if such be the decisions of our own Supreme Court upon this point, as I presume no gentleman upon this floor will venture to gainsay or deny, there is but one other question left, and that is, what was the law upon the subject of slavery in California or New Mexico at the time of their conquest? This is an important question. The whole merits of the case turn upon it. And upon this point, I sup-

pose, there can be no doubt. Slavery was abolished there in 1829. . . .

I take it for granted that nobody will deny that slavery was abolished in California and New Mexico at the time of their conquest by our arms. If a slave at that time had brought an action for his freedom against his master before the courts of the country, does any man doubt but that the courts under the law then in force would have declared him to be free? And as our court has decided that in all such cases the laws of the acquired territory in force at the time of the acquisition, shall remain in force as the law of the place until altered by competent authority, can any man doubt that they would decide the question just as the Mexican courts would have decided it at that time? . . .

. . . The Constitution recognizes slavery in Tennessee and Georgia, and in all the States where slavery exists by law; but it does not recognize it in New York or Ohio, or in any State where it is prohibited by the law of the State, except so far as it provides for the recapture of runaway slaves. . . . If my slave escapes and gets into a free State, the Constitution secures me the right of pursuing and retaking him: but if I voluntarily take my slave into a State where slavery by law is prohibited, I have no right to retake him; he becomes free. No man will question this. And if slavery is prohibited by the local law of the newly acquired territory, the only guarantee the Constitution affords the slaveholder is the right of recapture if he escapes and gets into those Territories. . . .

The Constitution secures to all the citizens of all the States and Territories of the Union the rights to which they are entitled by the laws of the place. If Virginia or Georgia should abolish slavery, the Constitution would no more reëstablish it there than it has reëstablished it in Pennsylvania, New York, and other States where it has been abolished. The Constitution no more carries the local law of slavery of any State into a State or Territory where, by law, it is prohibited, than it carries any other local law; no more than it carries the law of interest upon money, the statute of limitations, the laws of distribution, or

the penal laws of a State. And, sir, if this compromise bill had passed, how could the master have been protected against the theft or purloining of his slave? By what law would he have sued to recover him? By what law would the sale and evidences of title in slaves have been determined? Each of the slave States has its own laws upon this subject. And if the Constitution carries the laws of the States into these Territories, does it carry the laws of all or any particular one? And if any one, which is it? . . .

My position, Mr. Speaker, is this: That slavery is an institution which depends solely upon the municipal law of the place where it exists; and if it was prohibited by law in these Territories at the time of the conquest, it cannot exist there until the laws of the place be altered by the competent law-making power for the Territory. . . .

130. "*Squatter Sovereignty*." ¹

The theory of our Government presupposes that its various members have reserved to themselves the regulation of all subjects relating to what may be termed their internal police. They are sovereign within their boundaries, except in those cases where they have surrendered to the General Government a portion of their rights, in order to give effect to the objects of the Union, whether these concern foreign nations or the several States themselves. Local institutions, if I may so speak, whether they have reference to slavery or to any other relations, domestic or public, are left to local authority, either original or derivative. Congress has no right to say there shall be slavery in New York, or that there shall be no slavery in Georgia; nor is there any other human power, but the people of those States, respectively, which can change the relation existing therein; and they can say, if they will, "We will have slavery in the former, and we will abolish it in the latter."

In various respects, the Territories differ from the States. Some of their rights are inchoate, and they do not possess the

¹ Lewis Cass to Governor Nicholson, December 24, 1847. *Niles's Register*, LXXIII, 293-94.

peculiar attributes of sovereignty. Their relation to the General Government is very imperfectly defined by the Constitution; and it will be found, upon examination, that in that instrument the only grant of power concerning them is conveyed in the phrase, "Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." Certainly this phraseology is very loose, if it designed to include in the grant the whole power of legislation over persons, as well as things. The expression, the "territory and other property," fairly construed, related to the public lands, as such; to arsenals, dockyards, forts, ships, and all the various kinds of property which the United States may and must possess.

But surely the simple authority to *dispose of and regulate* these does not extend to the unlimited power of legislation; to the passage of all *laws*, in the most general acceptance of the word, which, by the by, is carefully excluded from the sentence. And, indeed, if this were so, it would render unnecessary another provision of the Constitution, which grants to Congress the power to legislate, with the consent of the States, respectively, over all places purchased for the "erection of forts, magazines, arsenals, dockyards," etc. These being the "*property*" of the United States, if the power to make "needful rules and regulations concerning" them includes the general power of legislation, then the grant of authority to regulate "the territory and other property of the United States" is unlimited, wherever subjects are found for its operation, and its exercise needed no auxiliary provision. If, on the other hand, it does not include such power of legislation over the "other property" of the United States, then it does not include it over their "*territory*;" for the same terms which grant the one grant the other. "*Territory*" is here classed with property, and treated as such; and the object was evidently to enable the General Government, as a property-holder — which, from necessity, it must be — to manage, preserve and "*dispose of*" such property as it might possess, and which authority is essential almost to its being. But the lives and persons of our citizens, with the

vast variety of objects connected with them, cannot be controlled by an authority which is merely called into existence for the purpose of making *rules and regulations for the disposition and management of property*.

Such, it appears to me, would be the construction put upon this provision of the Constitution, were this question now first presented for consideration, and not controlled by imperious circumstances. The original ordinance of the Congress of the Confederation, passed in 1787, and which was the only act upon this subject in force at the adoption of the Constitution, provided a complete frame of government for the country north of the Ohio, while in a territorial condition, and for its eventual admission in separate States into the Union. And the persuasion that this ordinance contained within itself all the necessary means of execution, probably prevented any direct reference to the subject in the Constitution, further than vesting in Congress the right to admit the States formed under it into the Union. However, circumstances arose, which required legislation, as well over the territory north of the Ohio, as over other territory, both within and without the original Union, ceded to the General Government, and, at various times, a more enlarged power has been exercised over the Territories — meaning thereby the different Territorial Governments — than is conveyed by the limited grant referred to. How far an existing necessity may have operated in producing this legislation, and thus extending, by rather a violent implication powers not directly given, I know not. But certain it is that the principle of interference should not be carried beyond the necessary implication, which produces it. It should be limited to the creation of proper governments for new countries, acquired or settled, and to the necessary provisions for their eventual admission into the Union; leaving, in the meantime, to the people inhabiting them, to regulate their internal concerns in their own way. They are just as capable of doing so as the people of the States; and they can do so, at any rate as soon as their political independence is recognized by admission into the Union. During this temporary condition, it is

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hardly expedient to call into exercise a doubtful and invidious authority which questions the intelligence of a respectable portion of our citizens, and whose limitation, whatever it may be, will be rapidly approaching its termination — an authority which would give to Congress despotic power, uncontrolled by the Constitution, over most important sections of our common country. . . .

131. *The Territorial Acts of 1850 for Utah and New Mexico.*¹

. . . Those enactments embrace, among other things, less material to the matters under consideration, the following provisions:

“When admitted as a State, the said Territory or any portion of the same, shall be received into the Union, with or without slavery, as their constitution may prescribe at the time of their admission.”

“That the legislative power and authority of said Territory shall be vested in the governor and a legislative assembly.”

“That the legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents.”

“Writs of error and appeals from the final decisions of said supreme court shall be allowed, and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witness, shall exceed one thousand dollars, except only that, in all cases involving title to slaves, the said writs of error or appeals shall be allowed and decided by the said supreme court, without regard to the value

¹ *Report of the Senate Committee on Territories, January 4, 1854. Senate Reports, No. 15, 33 Cong., 1 Sess.*

of the matter, property, or title in controversy; and except, also, that a writ of error or appeal shall also be allowed to the Supreme Court of the United States, from the decisions of the said supreme court created by this act, or of any judge thereof, or of the district courts created by this act, or of any judge thereof, upon any writ of habeas corpus involving the question of personal freedom; and each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; and the said supreme and district courts of the said Territory, and the respective judges thereof, shall and may grant writs of habeas corpus in all cases in which the same are granted by the judges of the United States in the District of Columbia."

CHAPTER XLV

THE RENDITION OF FUGITIVE SLAVES

THE facts in the case of *Prigg v. Pennsylvania* may be briefly stated. Prigg was the agent of Margaret Ashmore, a citizen of Maryland and owner of a negro woman who had escaped into Pennsylvania. Under warrant from a magistrate of Pennsylvania, Prigg had caused the woman to be apprehended; but he was unable to persuade the local authority, before whom she was brought, to take further cognizance of the case. Thereupon Prigg carried the woman and her children *vi et armis* out of the State and delivered them into the custody of their owner. For this forcible seizure and abduction, Prigg was subsequently indicted for felony under a Pennsylvania statute of 1826. Judgment in the lower courts against him was reaffirmed in the supreme court of Pennsylvania. The case was then taken to the Supreme Court of the United States on writ of error.

Under cover of the decision of the Court in this case of *Prigg v. Pennsylvania*, many Northern States passed personal liberty laws similar to that of Vermont which follows. These acts in turn led the South to demand a more stringent fugitive slave law. The Act of 1850 was framed to meet these demands. On the much-mooted question whether this statute of 1850 denied the privilege of the writ of *habeas corpus*, the opinion of the Attorney-General, John J. Crittenden, is of importance.

132. *Prigg v. Pennsylvania*.¹

Mr. Justice Story delivered the opinion of the Court:

There are two clauses in the constitution upon the subject of fugitives which stand in juxtaposition with each other, and have been thought mutually to illustrate each other. They are both contained in the second section of the fourth article. . . .

The last clause is that, the true interpretation whereof is directly in judgment before us. Historically, it is well known that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude. . . .

¹ Supreme Court of the United States, 1842. 16 Peters, 539.

The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no State law or regulation can in any way qualify, regulate, control, or restrain. The slave is not to be discharged from service or labor, in consequence of any State law or regulation. . . .

The owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own State confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding States. Indeed, this is no more than a mere affirmance of the principles of the common law applicable to this very subject. . . .

Upon this ground we have not the slightest hesitation in holding that, under and in virtue of the constitution, the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace or any illegal violence. In this sense and to this extent this clause of the constitution may properly be said to execute itself, and to require no aid from legislation, State or national.

But the clause of the constitution does not stop here; nor, indeed, consistently with its professed objects, could it do so. Many cases must arise in which, if the remedy of the owner were confined to the mere right of seizure and recaption, he would be utterly without any adequate redress. . . .

And this leads us to the consideration of the other part of the clause which implies at once a guaranty and duty. It says: "But he (the slave) shall be delivered up on claim of the party to whom such service or labor may be due." Now, we think it exceedingly difficult, if not impracticable, to read this language and not to feel that it contemplated some farther remedial redress than that which might be administered at the hands of the owner himself. A claim is to be made. What is a claim? It is, in a just juridical sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. . . . The slave is to be

delivered up on the claim. By whom to be delivered up? In what mode to be delivered up? How, if a refusal takes place, is the right of delivery to be enforced? Upon what proofs? What shall be the evidence of a rightful recaption or delivery? When and under what circumstances shall the possession of the owner, after it is obtained, be conclusive of his right, so as to preclude any further inquiry or examination into it by local tribunals or otherwise, while the slave, in possession of the owner, is in transitu to the State from which he fled?

These, and many other questions, will readily occur upon the slightest attention to the clause; and it is obvious that they can receive but one satisfactory answer. They require the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. . . .

Congress has taken this very view of the power and duty of the national government. . . . The result of their deliberations, was the passage of the Act of the 12th of February, 1793 (ch. 51, 7), which, after having, in the first and second sections, provided for the case of fugitives from justice by a demand to be made of the delivery through the executive authority of the State where they are found, proceeds, in the third section, to provide, that when a person held to labor or service in any of the United States shall escape into any other of the States or territories, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and take him or her before any judge of the circuit or district courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made; and upon proof to the satisfaction of such judge or magistrate, either by oral evidence or affidavit, &c., that the person so seized or arrested, doth, under the laws of the State or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the State

or territory from which he or she fled. The fourth section provides a penalty against any person who shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labor, or rescue such fugitive from the claimant, or his agent, or attorney, when so arrested, or who shall harbor or conceal such fugitive after notice that he is such; and it also saves to the person claiming such labor or service his right of action for or on account of such injuries.

In a general sense, this act may be truly said to cover the whole ground of the constitution, both as to fugitives from justice, and fugitive slaves; that is, it covers both the subjects in its enactments; not because it exhausts the remedies which may be applied by Congress to enforce the rights, if the provisions of the act shall in practice be found not to attain the object of the constitution; but because it points out fully all the modes of attaining those objects, which Congress, in their discretion, have as yet deemed expedient or proper to meet the exigencies of the constitution. . . .

We hold the act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty upon the grounds already stated. As to the authority so conferred upon State magistrates, while a difference of opinion has existed, and may exist still on the point, in different States, whether State magistrates are bound to act under it, none is entertained by this court, that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation.

The remaining question is, whether the power of legislation upon this subject is exclusive in the national government, or concurrent in the States, until it is exercised by Congress. In our opinion it is exclusive; and we shall now proceed briefly to state our reasons for that opinion. The doctrine stated by this court in *Sturgis v. Crowninshield* (4 Wheat. Rep. 122, 193) contains the true, although not the sole rule or consideration, which is applicable to this particular subject. "Wherever,"

said Mr. Chief Justice Marshall, in delivering the opinion of the court, "the terms in which a power is granted to Congress, or the nature of the power require, that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures as if they had been forbidden to act." The nature of the power and the true objects to be attained by it, are then as important to be weighed, in considering the question of its exclusiveness, as the words in which it is granted.

In the first place, it is material to state (what has been already incidentally hinted at) that the right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever State of the Union they may be found, and of course the corresponding power of Congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the constitution of the United States, and are there, for the first time, recognized and established in that peculiar character. . . . The natural inference deducible from this consideration certainly is, in the absence of any positive delegation of power to the State Legislatures, that it belongs to the legislative department of the national government, to which it owes its origin and establishment. . . .

In the next place, the nature of the provision and the objects to be attained by it require that it should be controlled by one and the same will, and act uniformly by the same system of regulations throughout the Union. If, then, the States have a right, in the absence of legislation by Congress, to act upon the subject, each State is at liberty to prescribe just such regulations as suit its own policy, local convenience, and local feelings. . . .

It is scarcely conceivable that the slaveholding States would have been satisfied with leaving to the legislation of the non-slaveholding States a power of regulation, in the absence of that of Congress, which would or might practically amount to a power to destroy the rights of the owner. If the argument, therefore, of a concurrent power in the States to act upon the subject matter in the absence of legislation by Congress be well

founded; then, if Congress had never acted at all, or if the act of Congress should be repealed without providing a substitute, there would be a resulting authority in each of the States to regulate the whole subject at its pleasure, and to dole out its own remedial justice, or withhold it at its pleasure and according to its own views of policy and expediency. Surely such a state of things never could have been intended, under such a solemn guaranty of right and duty. . . .

We entertain no doubt whatsoever that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers. . . . But such regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same.

Upon these grounds, we are of opinion that the act of Pennsylvania upon which this indictment is founded, is unconstitutional and void. . . .

133. *Report of the Legislature of Virginia, 1849.*¹

. . . The South is wholly without the benefit of that solemn constitutional guaranty which was so sacredly pledged to it at the formation of this Union. Our condition is precisely in effect, that which it was under the articles of the old confederation. No citizen of the South can pass the frontier of a non-slaveholding state and there exercise his undoubted constitutional right of seizing his fugitive slave, with a view to take him before a judicial officer and there prove his right of ownership, without imminent danger of being prosecuted criminally as a kidnapper, or being sued in a civil action for false imprisonment — imprisoned himself for want of bail, and subjected in his defence to an expense exceeding the whole value of the property claimed, or finally of being mobbed or being

¹ *Acts of Virginia, 1849-50, 240-54 passim.*

put to death in a street fight by insane fanatics or brutal ruffians. . . .

. . . The legislation to be found upon this subject, on the statute books of the non-slaveholding states, may be divided into two classes. The first of which would embrace the legislation of those states, which, professing a seeming respect for the obligations of the constitution, do, under the pretext of conforming to its requisitions, subject the slave owner to conditions utterly incompatible with the recovery of his slaves. . . .

Second, The laws of those states which affect no concealment of their hatred to Southern institutions, nor of their utter and open contempt and defiance of the obligations of the federal compact.

Of this class, which is now indeed the prevailing legislation of almost the whole non-slaveholding states, an act passed by the general assembly of the state of Vermont, on the 1st day of November 1843, may be cited as a fair illustration. It is in these words:

“An Act for the protection of Personal Liberty.

“It is hereby enacted by the general assembly of the state of Vermont, as follows:

“Sec. 1. No court of record in this state, nor any judge thereof, no justice of the peace nor other magistrate, acting under the authority of this state, shall hereafter take cognizance of, or grant any certificate, warrant or other process, in any case arising under section three of an act of congress, passed February twelfth, seventeen hundred and ninety-three, entitled ‘An act respecting fugitives from justice, and persons escaping from the service of their masters,’ to any person claiming any other person as a fugitive slave in this state.

“Sec. 2. No sheriff, deputy sheriff, high bailiff, constable, jailor, or other officer or citizen of this state, shall hereafter seize, arrest or detain, or aid in the seizure, arrest or detention, or imprisonment in any jail or other building belonging to this state, or to any county, town, city or person therein, of any person for the reason that he is or may be claimed as a fugitive slave.

"Sec. 3. No sheriff, deputy sheriff, high bailiff, constable, or other officer or citizen of this state, shall transport, or remove, or aid or assist in the transportation or removal of any fugitive slave, or any person claimed as such, from any place in this state to any other place within or without the same.

"Sec. 4. If any such judge, justice of the peace, magistrate, officer or citizen, shall offend against the two preceding sections, such judge, justice of peace, magistrate, officer or citizen, shall be subject to the penalties provided in section five of this act.

"Sec. 5. Any judge of any court of record in this state, any justice of the peace or other magistrate, any sheriff, deputy sheriff, high bailiff, constable, or jailor, or any citizen of this state, who shall offend against the provisions of this act, by acting directly or indirectly under the provisions of section three of the act of congress aforesaid, shall forfeit a sum not exceeding one thousand dollars, to the use of the state, to be recovered upon information or indictment, or be imprisoned in the state prison not exceeding five years." . . .

134. *Opinion of the Attorney-General on the Fugitive Slave Law of 1850.*¹

. . . The Supreme Court of the United States has decided that the owner independent of any aid from State or national legislation, may, in virtue of the constitution, and his own right of property, seize, and recapture his fugitive slave in whatsoever State he may find him, and carry him back to the State or Territory from which he escaped. (*Prigg vs. Commonwealth of Pennsylvania*, 18 Peters, 359.) This bill, therefore, confers no right on the owner of the fugitive slave. It only gives him an appointed and peaceable remedy in place of the more exposed and insecure, but not less lawful mode of self redress; and as to the fugitive slave, he has no cause to complain of this bill — it adds no coercion to that which the owner himself

¹ September 18, 1850. *Executive Documents*, 31 Cong., 2 Sess., 2099-2102 *passim*.

might, at his own will, rightfully exercise; and all the proceedings which it institutes are but so much of orderly judicial authority interposed between him and his owner and consequently a protection to him, and mitigation of the exercise directly by the owner himself of his personal authority. . . .

My opinion, as before expressed, is, that there is nothing in that clause or section [6th] which conflicts with or suspends or was intended to suspend the privilege of the writ of habeas corpus. I think so because the bill says not one word about that writ — because, by the constitution, Congress is expressly forbidden to suspend the privilege of this writ “Unless when in cases of rebellion or invasion the public safety may require it;” and, therefore, such suspension by this act (there being neither rebellion or invasion) would be a plain and palpable violation of the constitution, and no intention to commit such a violation of the constitution, of their duty and their oaths, ought to be imputed to them upon mere constructions and implications — and, thirdly, because there is no incompatibility between these provisions of the bill and the privilege of the writ of habeas corpus in its utmost constitutional latitude. . . .

“It is not within the province or privilege of this great writ to loose those whom the law has bound. That would be to put a writ granted by the law in opposition to the law, to make one part of the law destructive of another. This writ follows the law and obeys the law. It is issued, upon proper complaint, to make inquiry into the causes of commitment or imprisonment and its sole remedial power and purpose is to deliver the party from “all manner of illegal confinement.” (3 Black. Com. 131.) . . .

The condition of one in custody as a fugitive slave is, under this law, so far as respects the writ of habeas corpus, precisely the same as that of all other prisoners under the laws of the United States. The “privilege” of that writ remains alike to all of them, but to be judged of — granted, or refused — discharged or enforced — by the proper tribunal, according to the circumstances of each case, and as the commitment and detention may appear to be legal or illegal.

The whole effect of the law may be thus briefly stated; Congress has constituted a tribunal with exclusive jurisdiction to determine summarily, and without appeal, who are fugitives from service or labor under the 2d section of the 4th article of the constitution, and to whom such service or labor is due. The judgment of every tribunal of exclusive jurisdiction where no appeal lies, is of necessity, conclusive upon every other tribunal. And, therefore, the judgment of the tribunal created by this act is conclusive upon all tribunals[;] wherever this judgment is made to appear it is conclusive of the right of the owner to retain in his custody the fugitive from his service, and to remove him back to the place or state from which he escaped. If it is shown upon the application of the fugitive for a writ of habeas corpus, it prevents the issuing of the writ — if, upon the return, it discharges the writ and restores or maintains the custody.

The expressions used in the last clause of the 6th section, that the certificate therein alluded to “shall prevent all molestation” of the persons to whom granted “by any process issued,” &c., probably mean only what the act of 1795 meant by declaring a certificate under that act a sufficient warrant for the removal of the fugitive, and certainly do not mean a suspension of the habeas corpus. . . .

CHAPTER XLVI

THE DOCTRINE OF POPULAR SOVEREIGNTY

THE Kansas-Nebraska Act had a long and involved history. The Nebraska Bill, which was reported by the Committee on Territories of the Senate on January 4, 1854, conformed in general to the provisions of the Utah and New Mexico Acts. It contained no reference to the Missouri Compromise, but subsequently it was amplified by a section (omitted by a clerical error, it was said) which incorporated the three propositions contained in the report. All questions pertaining to slavery were to be left to the decision of the people through their appropriate representatives. Did this mean that the people were not to be restrained by the prohibition of the Missouri Act of 1820? All doubts on this point were removed by sundry amendments which were reported on January 23, by the Committee on Territories. Two Territories, Nebraska and Kansas, were now to be organized with the same provisions as in the case of Utah and New Mexico, while the Missouri Compromise was declared to have been "superseded by the principles of the legislation of 1850," and therefore to be "inoperative." On February 6, still another amendment was offered, — a compromise agreed upon in a Democratic caucus, — which was finally adopted and incorporated in sections 14 and 32. The restrictive section of the Missouri Act of 1820 was now declared to be "inconsistent with the principle of non-intervention by Congress with slavery in the States and Territories, as recognized by the legislation of 1850," and therefore "inoperative and void." Subjoined to the foregoing was the declaration: "It being the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States." It should be noted that Douglas employed the phrases "non-intervention" and "popular sovereignty" interchangeably, while his Southern colleagues repudiated popular sovereignty and acquiesced in non-intervention as in effect conceding all the rights which they claimed in the Territories. It should also be noted that the Kansas-Nebraska Act, like the Utah Act, provided for an ultimate appeal to the Supreme Court on all matters involving title to slave property in the Territories.

135. *Report of the Senate Committee on Territories, 1854.*¹

The principal amendments which your committee deem it their duty to commend to the favorable action of the Senate,

¹ *Senate Reports*, No. 15, 33 Cong., 1 Sess. January 4, 1854.

in a special report, are those in which the principles established by the compromise measures of 1850, so far as they are applicable to territorial organizations, are proposed to be affirmed and carried into practical operation within the limits of the new Territory.

The wisdom of those measures is attested, not less by their salutary and beneficial effects, in allaying sectional agitation and restoring peace and harmony to an irritated and distracted people, than by the cordial and almost universal, approbation with which they have been received and sanctioned by the whole country. In the judgment of your committee, those measures were intended to have a far more comprehensive and enduring effect than the mere adjustment of the difficulties arising out of the recent acquisition of Mexican territory. They were designed to establish certain great principles, which would not only furnish adequate remedies for existing evils, but, in all time to come, avoid the perils of a similar agitation, by withdrawing the question of slavery from the halls of Congress and the political arena, and committing it to the arbitrament of those who were immediately interested in, and alone responsible for its consequences. With the view of conforming their action to what they regard the settled policy of the government, sanctioned by the approving voice of the American people, your committee have deemed it their duty to incorporate and perpetuate, in their territorial bill, the principles and spirit of those measures. If any other considerations were necessary, to render the propriety of this course imperative upon the committee, they may be found in the fact, that the Nebraska country occupies the same relative position to the slavery question, as did New Mexico and Utah, when those territories were organized.

It was a disputed point, whether slavery was prohibited by law in the country acquired from Mexico. On the one hand it was contended, as a legal proposition, that slavery having been prohibited by the enactments of Mexico, according to the laws of nations, we received the country with all its local laws and domestic institutions attached to the soil, so far as they did

not conflict with the Constitution of the United States; and that a law, either protecting or prohibiting slavery, was not repugnant to that instrument, as was evidenced by the fact, that one-half of the States of the Union tolerated, while the other half prohibited, the institution of slavery. On the other hand it was insisted that, by virtue of the Constitution of the United States, every citizen had a right to remove to any Territory of the Union, and carry his property with him under the protection of law, whether that property consisted in persons or things. . . .

Such being the character of the controversy, in respect to the territory acquired from Mexico, a similar question has arisen in regard to the right to hold slaves in the proposed territory of Nebraska when the Indian laws shall be withdrawn, and the country thrown open to emigration and settlement. . . .

. . . The decision of this question involves the constitutional power of Congress to pass laws prescribing and regulating the domestic institutions of the various territories of the Union. In the opinion of those eminent statesmen, who hold that Congress is invested with no rightful authority to legislate upon the subject of slavery in the territories, the 8th section of the act preparatory to the admission of Missouri is null and void; while the prevailing sentiment in large portions of the Union sustains the doctrine that the Constitution of the United States secures to every citizen an inalienable right to move into any of the territories with his property, of whatever kind and description, and to hold and enjoy the same under the sanction of law. Your committee do not feel themselves called upon to enter into the discussion of these controverted questions. They involve the same grave issues which produced the agitation, the sectional strife, and the fearful struggle of 1850. As Congress deemed it wise and prudent to refrain from deciding the matters in controversy then, either by affirming or repealing the Mexican laws, or by an act declaratory of the true intent of the Constitution and the extent of the protection afforded by it to slave property in the territories, so your committee are not prepared now to recommend a departure from

the course pursued on that memorable occasion, either by affirming or repealing the 8th section of the Missouri act, or by any act declaratory of the meaning of the Constitution in respect to the legal points in dispute.

Your committee deem it fortunate for the peace of the country, and the security of the Union, that the controversy then resulted in the adoption of the compromise measures, which the two great political parties, with singular unanimity, have affirmed as a cardinal article of their faith, and proclaimed to the world, as a final settlement of the controversy and an end of the agitation. A due respect, therefore, for the avowed opinions of Senators, as well as a proper sense of patriotic duty, enjoins upon your committee the propriety and necessity of a strict adherence to the principles, and even a literal adoption of the enactments of that adjustment in all their territorial bills, so far as the same are not locally inapplicable. . . .

From these provisions it is apparent that the compromise measures of 1850 affirm and rest upon the following propositions — First: That all questions pertaining to slavery in the territories, and in the new States to be formed therefrom, are to be left to the decision of the people residing therein, by their appropriate representatives, to be chosen by them for that purpose.

Second: That “all cases involving title to slaves,” and “questions of personal freedom” are referred to the adjudication of the local tribunals, with the right of appeal to the Supreme Court of the United States.

Third: That the provisions of the Constitution of the United States, in respect to fugitives from service, is to be carried into faithful execution in all “the organized territories” the same as in the States. The substitute for the bill which your committee have prepared, and which is commended to the favorable action of the Senate, proposes to carry these propositions and principles into practical operation, in the precise language of the compromise measures of 1850.

136. *Senator Everett on the Principle of the Legislation of 1850.*¹

The Missouri restriction of 1820, it is said, is inconsistent with the principle of the legislation of 1850. If anything more is meant by "the principle" of the legislation of 1850, than the measures which were adopted at that time in reference to the Territories of New Mexico and Utah — for I may assume that those are the legislative measures referred to — if anything more is meant than that a certain measure was adopted, and enacted in reference to those Territories, I take issue on that point. I do not know that it could be proved that, even in reference to those Territories, a principle was enacted at all. A certain measure, or, if you please, a course of measures, was enacted in reference to the Territories of New Mexico and Utah; but I do not know that you can call this enacting a principle. It is certainly not enacting a principle which is to carry with it a rule for other Territories lying in other parts of the country, and in a different legal position. As to the principle of non-intervention on the part of Congress in the question of slavery, I do not find that, either as principle or as measure, it was enacted in those territorial bills of 1850. I do not, unless I have greatly misread them, find that there is anything at all which comes up to that. Every legislative act of those territorial governments must come before Congress for allowance or disallowance, and under those bills, without repealing them, without departing from them in the slightest degree, it would be competent for Congress to-morrow to pass any law on that subject.

How then can it be said that the principle of non-intervention on the part of Congress in the subject of slavery was enacted and established by the compromise measures of 1850? But, whether that be so or not, how can you find, in a simple measure applying in terms to these individual Territories, and to them alone, a rule which is to govern all other Territories with a retrospective and with a prospective action? Is it not a

¹ February 8, 1854. *Congressional Globe*, 33 Cong., 1 Sess., App., 160-62 *passim*.

mere begging of the question to say that those compromise measures, adopted in this specific case, amount to such a general rule?

But, let us try it in a parallel case. In the earlier land legislation of the United States, it was customary, without exception, when a territory became a State, to require that there should be a stipulation in their State constitution that the public lands sold within their borders should be exempted from taxation for five years after the sale. This, I believe, continued to be the uniform practice down to the year 1820, when the State of Missouri was admitted. She was admitted under this stipulation. If I mistake not, the next State which was admitted into the Union — but it is not important whether it was the next or not — came in without that stipulation, and they were left free to tax the public lands the moment when they were sold. Here was a principle; as much a principle as it is contended was established in the Utah and New Mexico territorial bill; but did any one suppose that it acted upon the other Territories? I believe the whole system is now abolished under the operation of general laws, and the influence of that example may have led to the change. But, until it was made by legislation, the mere fact that public lands sold in Arkansas, were immediately subject to taxation, could not alter the law in regard to the public lands sold in Missouri, or in any other State where they were exempt.

There is a case equally analogous to the very matter we are now considering — the prohibition or permission of slavery. The ordinance of 1787 prohibited slavery in the territory northwest of the Ohio. In 1790 Congress passed an act accepting the cession which the State of North Carolina had made of the western part of her territory, with the proviso, that in reference to the territory thus ceded Congress should pass no laws “tending to the emancipation of slaves.” Here was a precisely parallel case. Here was territory in which, in 1787, slavery was prohibited. Here was territory ceded by North Carolina, which became the territory of the United States south of the Ohio, in reference to which it was stipulated with North Carolina, that

Congress should pass no laws tending to the emancipation of slaves. But I believe it never occurred to any one that the legislation of 1790 acted back upon the ordinance of 1787, or furnished a rule by which any effect could be produced upon the state of things existing under that ordinance, in the territory to which it applied. . . .

Look at the words of the acts themselves. They are specific. They give you boundaries. The lines are run. The Territories are geographically marked out. They fill a particular place on the map of the continent; and it is provided that within those specific geographical limits a certain state of things, with reference to slavery shall exist. That is all. There is not a word which states on what principle that is done. There is not a word to tell you that that state of things carries with it a rule which is to operate elsewhere — retrospectively upon territory acquired in 1803, and prospectively on territory that shall be acquired to the end of time. There is not a word to carry the operation of those measures over the geographical boundary which is laid down in the bills themselves.

It would be singular if, under any circumstances the measures adopted should have this extended effect, without any words to indicate it. It would be singular, if there was nothing that stood in the way; but when you consider that there is a positive enactment in the way — the eighth section of the Missouri law, which you now propose to repeal because it does stand in the way — how can you think that these enactments of 1850 in reference to Utah and New Mexico were intended to overleap these boundaries in the face of positive law to the contrary, and to fall upon and decide the organization of Territories in a region purchased from France nearly fifty years before, and subject to a distinct specific legislative provision.

... . Sir, it is to me a most singular thing that words of extension in 1854 should be thought necessary in this bill to give the effect supposed to have been intended to the provisions of the acts of 1850, and that it should not be thought necessary in 1850 to put these words of extension into the original bills themselves.

Now, sir, let us look at the debates which took place at that time, because of course, one may always gather much more from the debates on one side and the other on any great question, as to the intention and meaning of a law, than can be gathered from the words of the statute itself. I have not had time to read these debates fully. That is what I complained of in the beginning. I have not had time to read, as thoroughly as I could wish, those voluminous reports — for they fill the greater part of two or three thick quarto volumes; but in what I have read, I do not find a single word from which it appears that any member of the Senate or House of Representatives, at that time, believed that the territorial enactments of 1850, either as principle, or rule, or precedent, or by analogy, or in any other way, were to act retrospectively or prospectively upon any other Territory. On the contrary, I find much, very much, of a broad, distinct, directly opposite bearing. . . .

A single word, sir, in respect to this supposed principle of non-intervention on the part of Congress in the subject of slavery in the Territories. . . . Why, sir, from the first enactment in 1789, down to the bill before us, there is no such principle in our legislation. As far as I can see it would be perfectly competent even now for Congress to pass any law that they pleased on the subject in the Territories under this bill. But, however that may be, even by this bill, there is not a law which the Territories can pass, admitting or excluding slavery, which it is not in the power of this Congress to disallow the next day. This is not a mere *brutum fulmen*. It is not an unexecuted power. Your statute-book shows case after case. I believe, in reference to a single Territory, that there have been fifteen or twenty cases where territorial legislation has been disallowed by Congress. . . .

137. *Senator Douglas on the Principle of Popular Sovereignty.*¹

The principle which we propose to carry into effect by the bill is this: That Congress shall neither legislate slavery into

¹ March 3, 1854. *Congressional Globe*, 33 Cong., 1 Sess., App., 326-37 *passim*.

any Territories or State, nor out of the same; but the people shall be left free to regulate their domestic concerns in their own way, subject only to the Constitution of the United States.

In order to carry this principle into practical operation, it becomes necessary to remove whatever legal obstacles might be found in the way of its free exercise. It is only for the purpose of carrying out this great fundamental principle of self-government that the bill renders the eighth section of the Missouri act inoperative and void. . . .

Any Senator who will take the trouble to examine our Journals, will find that on the 25th of March of that year I reported from the Committee on Territories two bills including the following measures: the admission of California, a territorial government for Utah, a territorial government for New Mexico, and the adjustment of the Texas boundary. These bills proposed to leave the people of Utah and New Mexico free to decide the slavery question for themselves, in the precise language of the Nebraska bill now under discussion. A few weeks afterwards the committee of thirteen took those two bills and put a wafer between them, and reported them back to the Senate as one bill, with some slight amendments. One of those amendments was, that the Territorial Legislatures should not legislate upon the subject of African slavery. I objected to that provision upon the ground that it subverted the great principle of self-government upon which the bill had been originally framed by the Territorial Committee. On the first trial, the Senate refused to strike it out, but subsequently did so, after full debate, in order to establish that principle as the rule of action in territorial organization. . . .

Upon this point I trust I will be excused for reading one or two sentences from some remarks I made in the Senate on the 3d of June, 1850:

"The position that I have ever taken has been that this [the slavery question], and all questions relating to the domestic affairs and domestic policy of the Territories, ought to be left to the decision of the people themselves, and that we ought to be content with whatever way they would decide the question,

because they have a much deeper interest in these matters than we have, and know much better what institutions suit them than we, who have never been there, can decide for them." . . .

Now, sir, what becomes of the declaration which has been made by nearly every opponent of this bill, that nobody in this whole Union ever dreamed that the principle of the Utah and New Mexican bill was to be incorporated into all future territorial organizations? . . .

Now, sir, if these gentlemen have entire confidence in the correctness of their own position, why do they not meet the issue boldly and fairly, and controvert the soundness of this great principle of popular sovereignty in obedience to the Constitution? They know full well that this was the principle upon which the colonies separated from the crown of Great Britain; the principle upon which the battles of the Revolution were fought, and the principle upon which our republican system was founded. They cannot be ignorant of the fact, that the Revolution grew out of the assertion of the right on the part of the imperial Government to interfere with the internal affairs and domestic concerns of the colonies. . . .

I will not weary the Senate in multiplying evidence upon this point. It is apparent that the Declaration of Independence had its origin in the violation of that great fundamental principle which secured to the people of the colonies the right to regulate their own domestic affairs in their own way; and that the Revolution resulted in the triumph of that principle, and the recognition of the right asserted by it. . . . It is the same doctrine, when applied to the Territories and new States of this Union, which the British Government attempted to enforce by the sword upon the American colonies. It is this fundamental principle of self-government which constitutes the distinguishing feature of the Nebraska bill. . . .

CHAPTER XLVII

DRED SCOTT *v.* SANDFORD

THE pertinent facts in the history of the Dred Scott case may be briefly stated. Dred Scott, a negro belonging to Dr. Emerson, of the United States Army, had been taken by his master in 1834 from Missouri to Rock Island in the State of Illinois. Two years later he was taken to Fort Snelling in the northern part of the territory acquired from France in 1803, in which slavery had been forbidden by the Missouri Compromise. He there married. In 1838, Dr. Emerson returned to Missouri with Scott and his family. In 1847, Dred Scott brought suit in the circuit court of the State of Missouri to recover his freedom. Judgment was rendered in his favor, but in the supreme court of the State, to which the case was taken on appeal, the judgment was reversed. Meantime Scott and his family had been made over to Sandford, a citizen of New York; and though his case was still in the state court, he brought suit against Sandford to assert the title of himself and his family to freedom. The case of Scott *v.* Sandford — in form a suit between citizens of different States — was tried in the Circuit Court of the United States for the district of Missouri. Sandford pleaded that this could not be a suit between citizens of different States because Scott was not a citizen of Missouri, being “a negro of pure African descent.” The court overruled this plea, but sustained the defendant on other grounds. The case was then appealed on writ of error to the Supreme Court of the United States. Seven of the nine judges concurred in the judgment that Scott was not a citizen of Missouri and that therefore the Circuit Court had no jurisdiction in the case; six judges concurred in declaring the Missouri Compromise unconstitutional. What is commonly called the opinion of the Court hardly merits the term, for none of the concurring judges accepted fully the process of reasoning by which the Chief Justice justified the judgment of the Court. On the technical question as to whether the plea in abatement was properly before the Court and on the further question as to the propriety of the so-called *dictum* relating to the Missouri Compromise, the reader may consult with profit an article on “The Dred Scott Decision,” by Edward S. Corbin, in the *American Historical Review* for October, 1911. Extracts from Justice Curtis’s dissenting opinion are appended to indicate the issue between him and Chief Justice Taney as to the sources of citizenship within the recognition of the Constitution.

138. *Dred Scott, Plaintiff in Error, v. John F. A. Sandford.*¹

Mr. Chief Justice Taney delivered the opinion of the Court:

¹ Supreme Court of the United States, 1857. 19 Howard, 393.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And
2. If it had jurisdiction, is the judgment it has given erroneous or not? . . .

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated. . . . It is suggested, however, that this plea is not before us. . . . We think they [the plea and the judgment of the court upon it] are before us . . . and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States. . . .

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, privileges and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution. . . .

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the

comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character. . . .

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards, by birthright or otherwise, become members, according to the provisions of the Constitution and the principles on which it was founded. . . .

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. . . .

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . .

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . .

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slave-holding States regarded them as included in the word citizens, or would have consented to a constitution which might compel them to receive them in that character from another State. . . .

To all this mass of proof we have still to add, that Congress

has repeatedly legislated upon the same construction of the Constitution that we have given. . . .

The conduct of the Executive Department of the Government has been in perfect harmony upon this subject with this course of legislation. . . .

And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous. . . .

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom. . . .

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more. . . .

At the time when the territory in question was obtained by cession from France, it contained no population fit to be asso-

ciated together and admitted as a State; and it therefore was absolutely necessary to hold possession of it, as a Territory belonging to the United States, until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the General Government, as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit; for it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the Territory in question, and the Government holds it for their common use until it shall be associated with the other States as a member of the Union.

But until that time arrives, it is undoubtedly necessary that some Government should be established, in order to organize society, and to protect the inhabitants in their persons and property; and as the people of the United States could act in this matter only through the Government which represented them, and through which they spoke and acted when the Territory was obtained, it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a Government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition, and to gather there a population which would enable it to assume the position to which it was destined among the States of the Union. . . . But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. . . . Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because

of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. . . .

I can find nothing in the Constitution which, *proprio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its constitution and laws. And my opinion is, that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its constitution or laws, is also a citizen of the United States. . . .

The Constitution having recognized the rule that persons born within the several States are citizens of the United States, one of four things must be true:

First. That the Constitution itself has described what native-born persons shall or shall not be citizens of the United States; or,

Second. That it has empowered Congress to do so; or,

Third. That all free persons, born within the several States, are citizens of the United States; or,

Fourth. That it is left to each State to determine what free persons, born within its limits, shall be citizens of such State, and thereby be citizens of the United States. . . .

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each State are citizens of the United States.

Second. That as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

Third. That every such citizen, residing in any State, has

reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. . . .

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois. . . .

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us, that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

*Dissenting Opinion of Justice Curtis.*¹

. . . One mode of approaching this question is, to inquire who were citizens of the United States at the time of the adoption of the Constitution.

Citizens of the United States at the time of the adoption of the Constitution can have been no other than the citizens of the United States under the Confederation. . . .

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification

¹ 19 Howard, 393.

CHAPTER XLVIII

POPULAR SOVEREIGNTY AND THE DRED SCOTT DECISION

THE peculiar merit claimed for the Kansas-Nebraska Bill was that it would rid Congress of a vexatious question by providing for a popular referendum on slavery in the Territories. Two circumstances prevented a fair test of this device: the bitter and unexpected struggle between the pro-slavery and free-soil settlers in Kansas, and the decision of the Supreme Court in the case of Dred Scott. Whatever efficacy might still be claimed for popular sovereignty, it could hardly stand as a principle of public law after the Supreme Court had registered its opinion that Congress might not prohibit slavery in the Territories. The senatorial contest between Douglas and Lincoln in Illinois brought out the various aspects of the constitutional question. The candidates met in seven joint debates through the State. In the opening debate at Ottawa, Lincoln propounded the crucial question to which Douglas made reply at Freeport in the second encounter. The concluding extract is from a speech made by Lincoln at Columbus, Ohio, in the following year.

139. *The Freeport Doctrine.*¹

The next question propounded to me by Mr. Lincoln is, Can the people of a Territory in any lawful way, against the wishes of any citizen of the United States, exclude slavery from their limits prior to the formation of a State constitution? I answer emphatically, as Mr. Lincoln has heard me answer a hundred times from every stump in Illinois, that in my opinion the people of a Territory can, by lawful means, exclude slavery from their limits prior to the formation of a State constitution. Mr. Lincoln knew that I had answered that question over and over again. He heard me argue the Nebraska bill on that principle all over the State in 1854, in 1855, and in 1856, and he has no excuse for pretending to be in doubt as to my position on that question. It matters not what way the Supreme Court may hereafter decide as to the abstract question whether slavery may or may not go into a Territory under the Constitution,

¹ Speech of Douglas at Freeport, August 27, 1858. *The Lincoln-Douglas Debates of 1858* (Sparks ed.), 161-62.

the people have the lawful means to introduce it or exclude it as they please, for the reason that slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations. Those police regulations can only be established by the local legislature; and if the people are opposed to slavery, they will elect representatives to that body who will by unfriendly legislation effectually prevent the introduction of it into their midst. If, on the contrary, they are for it, their legislation will favor its extension. Hence, no matter what the decision of the Supreme Court may be on that abstract question, still the right of the people to make a Slave Territory or a Free Territory is perfect and complete under the Nebraska bill. I hope Mr. Lincoln deems my answer satisfactory on that point.

140. *Lincoln's Reply at Jonesboro.*¹

The second interrogatory that I propounded to him was this: —

“Question 2. Can the people of a United States Territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a State Constitution?”

To this Judge Douglas answered that they can lawfully exclude slavery from the Territory prior to the formation of a Constitution. He goes on to tell us how it can be done. As I understand him, he holds that it can be done by the Territorial Legislature refusing to make any enactments for the protection of slavery in the Territory, and especially by adopting unfriendly legislation to it. For the sake of clearness, I state it again: that they can exclude slavery from the Territory, 1st, by withholding what he assumes to be an indispensable assistance to it in the way of legislation; and, 2d, by unfriendly legislation. If I rightly understand him, I wish to ask your attention for a while to his position.

In the first place, the Supreme Court of the United States has decided that any Congressional prohibition of slavery in the Territories is unconstitutional; that they have reached this

¹ September 15. *The Lincoln-Douglas Debates of 1858*, 242-45.

proposition as a conclusion from their former proposition, that the Constitution of the United States expressly recognizes property in slaves, and from that other Constitutional provision, that no person shall be deprived of property without due process of law. Hence they reach the conclusion that as the Constitution of the United States expressly recognizes property in slaves, and prohibits any person from being deprived of property without due process of law, to pass an Act of Congress by which a man who owned a slave on one side of a line would be deprived of him if he took him on the other side, is depriving him of that property without due process of law. That I understand to be the decision of the Supreme Court. I understand also that Judge Douglas adheres most firmly to that decision; and the difficulty is, how is it possible for any power to exclude slavery from the Territory, unless in violation of that decision? That is the difficulty.

In the Senate of the United States, in 1856, Judge Trumbull, in a speech substantially, if not directly, put the same interrogatory to Judge Douglas, as to whether the people of a Territory had the lawful power to exclude slavery prior to the formation of a constitution. Judge Douglas then answered at considerable length, and his answer will be found in the *Congressional Globe*, under date of June 9th, 1856. The Judge said that whether the people could exclude slavery prior to the formation of a constitution or not *was a question to be decided by the Supreme Court*. He put that proposition, as will be seen by the *Congressional Globe*, in a variety of forms, all running to the same thing in substance, — that it was a question for the Supreme Court. I maintain that when he says, after the Supreme Court have decided the question, that the people may yet exclude slavery by any means whatever, he does virtually say that it is *not* a question for the Supreme Court.

He shifts his ground. I appeal to you whether he did not say it was a question for the Supreme Court? Has not the Supreme Court decided that question? When he now says the people may exclude slavery, does he not make it a question for the people? Does he not virtually shift his ground and say that it is

not a question for the court, but for the people? This is a very simple proposition, — a very plain and naked one. It seems to me that there is no difficulty in deciding it. In a variety of ways he said that it was a question for the Supreme Court. He did not stop then to tell us that whatever the Supreme Court decides, the people can by withholding necessary “police regulations” keep slavery out. He did not make any such answer. I submit to you now whether the new state of the case has not induced the Judge to sheer away from his original ground. Would not this be the impression of every fair-minded man?

I hold that the proposition that slavery cannot enter a new country without police regulations is historically false. It is not true at all. I hold that the history of this country shows that the institution of slavery was originally planted upon this continent without these “police regulations” which the Judge now thinks necessary for the actual establishment of it. Not only so, but is there not another fact: how came this Dred Scott decision to be made? It was made upon the case of a negro being taken and actually held in slavery in Minnesota Territory, claiming his freedom because the Act of Congress prohibited his being so held there. *Will the Judge pretend that Dred Scott was not held there without police regulations?* There is at least one matter of record as to his having been held in slavery in the Territory, not only without police regulations, but in the teeth of Congressional legislation supposed to be valid at the time. This shows that there is vigor enough in slavery to plant itself in a new country even against unfriendly legislation. It takes not only law, but the *enforcement* of law to keep it out. That is the history of this country upon the subject.

I wish to ask one other question. It being understood that the Constitution of the United States guarantees property in slaves in the Territories, if there is any infringement of the right of that property, would not the United States courts, organized for the government of the Territory, apply such remedy as might be necessary in that case? It is a maxim held by the courts that there is no wrong without its remedy; and the courts have a remedy for whatever is acknowledged and treated as a wrong.

Again: I will ask you, my friends, if you were elected members of the Legislature, what would be the first thing you would have to do before entering upon your duties? *Swear to support the Constitution of the United States.* Suppose you believe, as Judge Douglas does, that the Constitution of the United States guarantees to your neighbor the right to hold slaves in that Territory; that they are his property; how can you clear your oaths unless you give him such legislation as is necessary to enable him to enjoy that property? What do you understand by supporting the Constitution of a State, or of the United States? Is it not to give such constitutional helps to the rights established by that Constitution as may be practically needed? Can you, if you swear to support the Constitution, and believe that the Constitution establishes a right, clear your oath, without giving it support? Do you support the Constitution if, knowing or believing there is a right established under it which needs specific legislation, you withhold that legislation? Do you not violate and disregard your oath? I can conceive of nothing plainer in the world. There can be nothing in the words "support the Constitution," if you may run counter to it by refusing support to any right established under the Constitution. And what I say here will hold with still more force against the Judge's doctrine of "unfriendly legislation." How could you, having sworn to support the Constitution, and believing it guaranteed the right to hold slaves in the Territories, assist in legislation *intended to defeat that right*? That would be violating your own view of the Constitution. Not only so, but if you were to do so, how long would it take the courts to hold your votes unconstitutional and void? Not a moment. . . .

141. *Douglas's Rejoinder at Jonesboro.*¹

My doctrine is, that even taking Mr. Lincoln's view that the decision recognizes the right of a man to carry his slaves into the Territories of the United States if he pleases, yet after he gets there he needs affirmative law to make that right of any

¹ September 15, 1858. *The Lincoln-Douglas Debates of 1858* (Sparks ed.), 258.

value. The same doctrine not only applies to slave property, but all other kinds of property. Chief Justice Taney places it upon the ground that slave property is on an equal footing with other property. Suppose one of your merchants should move to Kansas and open a liquor store: he has a right to take groceries and liquors there; but the mode of selling them, and the circumstances under which they shall be sold, and all the remedies, must be prescribed by local legislation; and if that is unfriendly, it will drive him out just as effectually as if there was a constitutional provision against the sale of liquor. So the absence of local legislation to encourage and support slave property in a Territory excludes it practically just as effectually as if there was a positive constitutional provision against it.

Hence, I assert that under the Dred Scott decision you cannot maintain slavery a day in a Territory where there is an unwilling people and unfriendly legislation. If the people are opposed to it, our right is a barren, worthless, useless right; and if they are for it, they will support and encourage it. We come right back, therefore, to the practical question, If the people of a Territory want slavery, they will have it; and if they do not want it, you cannot force it on them. And this is the practical question, the great principle, upon which our institutions rest. I am willing to take the decision of the Supreme Court as it was pronounced by that august tribunal, without stopping to inquire whether I would have decided that way or not. . . .

142. *Speech of Lincoln at Columbus, Ohio.*¹

. . . I wish to say something now in regard to the Dred Scott decision, as dealt with by Judge Douglas. In that "memorable debate" between Judge Douglas and myself, last year, the Judge thought fit to commence a process of catechising me, and at Freeport I answered his questions, and propounded some to him. Among others propounded to him was one that I have here now. The substance, as I remember it, is, "Can the people of a United States Territory, under the Dred Scott decision, in

¹ September, 1859. *Political Debates between Lincoln and Douglas* (Columbus, 1860), 250-51 *passim*.

any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits, prior to the formation of a State Constitution?" He answered that they could lawfully exclude slavery from the United States Territories, notwithstanding the Dred Scott decision. There was something about that answer that has probably been a trouble to the Judge ever since.

* The Dred Scott decision expressly gives every citizen of the United States a right to carry his slaves into the United States Territories. And now there was some inconsistency in saying that the decision was right, and saying, too, that the people of the Territory could lawfully drive slavery out again. When all the trash, the words, the collateral matter, was cleared away from it — all the chaff was fanned out of it, it was a bare absurdity — *no less than that a thing may be lawfully driven away from where it has a lawful right to be*. Clear it of all the verbiage, and that is the naked truth of his proposition — that a thing may be lawfully driven from the place where it has a lawful right to stay. . . .

But I undertake to give the opinion, at least, that if the Territories attempt by any direct legislation to drive the man with his slave out of the Territory, or to decide that his slave is free because of his being taken in there, or to tax him to such an extent that he cannot keep him there, the Supreme Court will unhesitatingly decide all such legislation unconstitutional, as long as that Supreme Court is constructed as the Dred Scott Supreme Court is. The first two things they have already decided, except that there is a little quibble among lawyers between the words *dicta* and decision. They have already decided a negro cannot be made free by territorial legislation. . . .

What is that Dred Scott decision? Judge Douglas labors to show that it is one thing, while I think it is altogether different. It is a long opinion, but it is all embodied in this short statement: "The Constitution of the United States forbids Congress to deprive a man of his property, without due process of law; the right of property in slaves is distinctly and expressly af-

firmed in that Constitution; therefore if Congress shall undertake to say that a man's slave is no longer his slave, when he crosses a certain line into a Territory, that is depriving him of his property without due process of law, and is unconstitutional." There is the whole Dred Scott decision. They add that if Congress cannot do so itself, Congress cannot confer any power to do so, and hence any effort by the Territorial Legislature to do either of these things is absolutely decided against. It is a foregone conclusion by that court.

Now, as to this indirect mode by "unfriendly legislation," all lawyers here will readily understand that such a proposition cannot be tolerated for a moment, because a legislature cannot indirectly do that which it cannot accomplish directly. Then I say any legislation to control this property, as property, for its benefit as property, would be hailed by this Dred Scott Supreme Court, and fully sustained; but any legislation driving slave property out, or destroying it as property, directly or indirectly, will most assuredly, by that court, be held unconstitutional. . . .

CHAPTER XLIX

SECESSION AND COERCION

THE annual message of President Buchanan in 1860 was drafted in the well-founded expectation that the convention summoned by the legislature of South Carolina would adopt an ordinance of secession. Advised by Attorney-General Black, the President interpreted narrowly his powers under the Act of 1795 and chose to stand simply on the defensive, leaving Congress to pursue the traditional, but now ineffectual, policy of compromise. On December 20, the convention of South Carolina repealed the ordinance by which it had ratified the Federal Constitution, and four days later declared to the world the causes which had brought about this momentous step. True to its theory of the Union, the convention dispatched commissioners to Washington to wind up the affairs of the partnership, styled the United States of America, from which the State had withdrawn.

143. *Opinion of Attorney-General Black upon the Powers of the President.*¹

. . . I come now to the point in your letter which is probably of the greatest practical importance. By the act of 1807 you may employ such parts of the land and naval forces as you shall judge necessary for the purpose of causing the laws to be duly executed, in all cases where it is lawful to use the militia for the same purpose. By the act of 1795 the militia may be called forth "whenever the laws of the United States shall be opposed or the execution thereof obstructed in any State by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals." This imposes upon the President the sole responsibility of deciding whether the exigency has arisen which requires the use of military force; and in proportion to the magnitude of that responsibility will be his care not to overstep the limits of his legal and just authority.

The laws referred to in the act of 1795 are manifestly those

¹ November 20, 1860. McPherson, *Political History of the United States of America during the Great Rebellion*, 51-52.

which are administered by the judges and executed by the ministerial officers of the courts for the punishment of crime against the United States, for the protection of rights claimed under the Federal Constitution and laws, and for the enforcement of such obligations as come within the cognizance of the Federal Judiciary. To compel obedience to these laws, the Courts have authority to punish all who obstruct their regular administration, and the marshals and their deputies have the same powers as sheriffs and their deputies in the several States in executing the laws of the States. These are the ordinary means provided for the execution of the laws, and the whole spirit of our system is opposed to the employment of any other except in cases of extreme necessity, arising out of great and unusual combinations against them. Their agency must continue to be used until their incapacity to cope with the power opposed to them shall be plainly demonstrated. It is only upon clear evidence to that effect that a military force can be called into the field. Even then its operations must be purely defensive. It can suppress only such combinations as are found directly opposing the laws and obstructing the execution thereof. It can do no more than what might and ought to be done by a civil posse, if a civil posse could be raised large enough to meet the same opposition. On such occasions especially the military power must be kept in strict subordination to the civil authority, since it is only in aid of the latter that the former can act at all. . . .

144. *President Buchanan's Message of December 3, 1860.*¹

. . . In order to justify secession as a constitutional remedy, it must be on the principle that the Federal Government is a mere voluntary association of States, to be dissolved at pleasure by any one of the contracting parties. If this be so, the Confederacy is a rope of sand, to be penetrated and dissolved by the first adverse wave of public opinion in any of the States. In this manner our thirty-three States may resolve themselves into as many petty, jarring, and hostile republics, each one

¹ Richardson, *Messages and Papers of the Presidents*, v, 630-36 *passim*.

retiring from the Union without responsibility whenever any sudden excitement might impel them to such a course. By this process a Union might be entirely broken into fragments in a few weeks which cost our forefathers many years of toil, privation, and blood to establish.

Such a principle is wholly inconsistent with the history as well as the character of the Federal Government. . . .

It was intended to be perpetual, and not to be annulled at the pleasure of any one of the contracting parties. The old Articles of Confederation were entitled "Articles of Confederation and Perpetual Union between the States," and by the thirteenth article it is expressly declared that "the articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual." The preamble to the Constitution of the United States, having express reference to the Articles of Confederation, recites that it was established "in order to form a more perfect union." And yet it is contended that this "more perfect union" does not include the essential attribute of perpetuity.

But that the Union was designed to be perpetual appears conclusively from the nature and extent of the powers conferred by the Constitution on the Federal Government. These powers embrace the very highest attributes of national sovereignty. . . .

This Government, therefore, is a great and powerful Government, invested with all the attributes of sovereignty over the special subjects to which its authority extends. Its framers never intended to implant in its bosom the seeds of its own destruction, nor were they at its creation guilty of the absurdity of providing for its own dissolution. . . .

It may be asked, then, Are the people of the States without redress against the tyranny and oppression of the Federal Government? By no means. The right of resistance on the part of the governed against the oppression of their governments can not be denied. It exists independently of all constitutions, and has been exercised at all periods of the world's history. Under it old governments have been destroyed and

new ones have taken their place. It is embodied in strong and express language in our own Declaration of Independence. But the distinction must ever be observed that this is revolution against an established government, and not a voluntary secession from it by virtue of an inherent constitutional right. In short, let us look the danger fairly in the face. Secession is neither more nor less than revolution. It may or it may not be a justifiable revolution, but still it is revolution.

What, in the meantime, is the responsibility and true position of the Executive? He is bound by solemn oath, before God and the country, "to take care that the laws be faithfully executed," and from this obligation he can not be absolved by any human power. But what if the performance of this duty, in whole or in part, has been rendered impracticable by events over which he could have exercised no control? Such at the present moment is the case throughout the State of South Carolina so far as the laws of the United States to secure the administration of justice by means of the Federal judiciary are concerned. All the Federal officers within its limits through whose agency alone these laws can be carried into execution have already resigned. We no longer have a district judge, a district attorney, or a marshal in South Carolina. In fact, the whole machinery of the Federal Government necessary for the distribution of remedial justice among the people has been demolished, and it would be difficult, if not impossible, to replace it.

The only acts of Congress on the statute book bearing upon this subject are those of February 28, 1795, and March 3, 1807. These authorize the President, after he shall have ascertained that the marshal, with his *posse comitatus*, is unable to execute civil or criminal process in any particular case, to call forth the militia and employ the Army and Navy to aid him in performing this service, having first by proclamation commanded the insurgents "to disperse and retire peaceably to their respective abodes within a limited time." This duty can not by possibility be performed in a State where no judicial authority exists to issue process, and where there is no marshal to execute

it, and where, even if there were such an officer, the entire population would constitute one solid combination to resist him.

The bare enumeration of these provisions proves how inadequate they are without further legislation to overcome a united opposition in a single State, not to speak of other States who may place themselves in a similar attitude. Congress alone has power to decide whether the present laws can or can not be amended so as to carry out more effectually the objects of the Constitution.

The same insuperable obstacles do not lie in the way of executing the laws for the collection of the customs. The revenue still continues to be collected as heretofore at the custom-house in Charleston, and should the collector unfortunately resign a successor may be appointed to perform this duty.

Then, in regard to the property of the United States in South Carolina. This has been purchased for a fair equivalent, "by the consent of the legislature of the State," "for the erection of forts, magazines, arsenals," etc., and over these the authority "to exercise exclusive legislation" has been expressly granted by the Constitution to Congress. It is not believed that any attempt will be made to expel the United States from this property by force; but if in this I should prove to be mistaken, the officer in command of the forts has received orders to act strictly on the defensive. In such a contingency the responsibility for consequences would rightfully rest upon the heads of the assailants.

Apart from the execution of the laws, so far as this may be practicable, the Executive has no authority to decide what shall be the relations between the Federal Government and South Carolina. . . . It is therefore my duty to submit to Congress the whole question in all its bearings. . . .

The question fairly stated is, Has the Constitution delegated to Congress the power to coerce a State into submission which is attempting to withdraw or has actually withdrawn from the Confederacy? If answered in the affirmative, it must be on the principle that the power has been conferred upon

Congress to declare and to make war against a State. After much serious reflection I have arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government. . . .

Without descending to particulars, it may be safely asserted that the power to make war against a State is at variance with the whole spirit and intent of the Constitution. . . .

The fact is that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war. If it can not live in the affections of the people, it must one day perish. Congress possesses many means of preserving it by conciliation, but the sword was not placed in their hand to preserve it by force. . . .

145. *South Carolina Declaration of Causes.*¹

. . . In 1787, Deputies were appointed by the States to revise the articles of Confederation; and on 17th September, 1787, these Deputies recommended, for the adoption of the States, the Articles of Union, known as the Constitution of the United States.

The parties to whom this constitution was submitted were the several sovereign States; they were to agree or disagree, and when nine of them agreed, the compact was to take effect among those concurring; and the General Government, as the common agent, was then to be invested with their authority. . . .

On the 23d May, 1788, South Carolina, by a Convention of her people, passed an ordinance assenting to this Constitution, and afterwards altered her own Constitution to conform herself to the obligations she had undertaken.

Thus was established, by compact between the States, a Government with defined objects and powers, limited to the express words of the grant. This limitation left the whole remaining mass of power subject to the clause reserving it to the States or the people, and rendered unnecessary any specification of reserved rights. We hold that the Government thus

¹ Moore, *Rebellion Record*, 1, 3-4, *passim*. December 24, 1860.

established is subject to the two great principles¹ asserted in the Declaration of Independence; and we hold further, that the mode of its formation subjects it to a third fundamental principle, namely, the law of compact. We maintain that in every compact between two or more parties the obligation is mutual; that the failure of one of the contracting parties to perform a material part of the agreement, entirely releases the obligation of the other; and that, where no arbiter is provided, each party is remitted to his own judgment to determine the fact of failure, with all its consequences.

In the present case, that fact is established with certainty. We assert that fourteen of the States have deliberately refused for years past to fulfil their constitutional obligations, and we refer to their own statutes for the proof.

The Constitution of the United States, in its fourth Article, provides as follows: . . . [See Section 2; Clause 3.]

This stipulation was so material to the compact that without it that compact would not have been made. The greater number of the contracting parties held slaves, and they had previously evinced their estimate of the value of such a stipulation by making it a condition in the Ordinance for the government of the territory ceded by Virginia, which obligations, and the laws of the General Government, have ceased to effect the objects of the Constitution. The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin, and Iowa, have enacted laws which either nullify the acts of Congress, or render useless any attempt to execute them. In many of these States the fugitive is discharged from the service of labor claimed, and in none of them has the State Government complied with the stipulation made in the Constitution. The State of New Jersey, at an early day, passed a law in conformity with her constitutional obligation; but the current of Anti-Slavery feeling has led her more recently to

¹ "The right of a State to govern itself; and the right of a people to abolish a Government when it becomes destructive of the ends for which it was instituted."

enact laws which render inoperative the remedies provided by her own laws and by the laws of Congress. In the State of New York even the right of transit for a slave has been denied by her tribunals; and the States of Ohio and Iowa have refused to surrender to justice fugitives charged with murder, and with inciting servile insurrection in the State of Virginia. Thus the constitutional compact has been deliberately broken and disregarded by the non-slaveholding States; and the consequence follows that South Carolina is released from her obligation. . . .

We affirm that these ends for which this Government was instituted have been defeated, and the Government itself has been destructive of them by the action of the non-slaveholding States. Those States have assumed the right of deciding upon the propriety of our domestic institutions; and have denied the rights of property established in fifteen of the States and recognized by the Constitution; they have denounced as sinful the institution of Slavery; they have permitted the open establishment among them of societies, whose avowed object is to disturb the peace of and eloin the property of the citizens of other States. They have encouraged and assisted thousands of our slaves to leave their homes; and those who remain, have been incited by emissaries, books, and pictures, to servile insurrection.

For twenty-five years this agitation has been steadily increasing, until it has now secured to its aid the power of the common Government. Observing the *forms* of the Constitution, a sectional party has found within that article establishing the Executive Department, the means of subverting the Constitution itself. A geographical line has been drawn across the Union, and all the States north of that line have united in the election of a man to the high office of President of the United States whose opinions and purposes are hostile to Slavery. He is to be intrusted with the administration of the common Government, because he has declared that that "Government cannot endure permanently half slave, half free," and that the public mind must rest in the belief that Slavery is in the course of ultimate extinction.

This sectional combination for the subversion of the Constitution has been aided, in some of the States, by elevating to citizenship persons who, by the supreme law of the land, are incapable of becoming citizens; and their votes have been used to inaugurate a new policy, hostile to the South, and destructive of its peace and safety.

On the 4th of March next this party will take possession of the Government. It has announced that the South shall be excluded from the common territory, that the Judicial tribunal shall be made sectional, and that a war must be waged against Slavery until it shall cease throughout the United States.

The guarantees of the Constitution will then no longer exist; the equal rights of the States will be lost. The Slaveholding States will no longer have the power of self-government, or self-protection, and the Federal Government will have become their enemy. . . .

146. *Dissolution of the Partnership.*¹

The sites of forts, arsenals, navy-yards, and other public property of the Federal Government were ceded by the States, within whose limits they were, subject to the condition, either expressed or implied, that they should be used solely and exclusively for the purposes for which they were granted. The ultimate ownership of the soil, or eminent domain, remains with the people of the State in which it lies, by virtue of their sovereignty. . . .

A State withdrawing from the Union would necessarily assume the control theretofore exercised by the General Government over all public defenses and other public property within her limits. It would, however, be but fair and proper that adequate compensation should be made to the other members of the partnership, or their common agent, for the value of the works and for any other advantage obtained by the one party, or loss incurred by the other. Such equitable settlement, the seceding States of the South, without exception, as I believe, were desirous to make, and prompt to propose to the Federal authorities. . . .

¹ Davis, *Rise and Fall of the Confederate Government*, I, 209-14 *passim*.

Immediately after the secession of the State, the Convention of South Carolina deputed three distinguished citizens of that State — Messrs. Robert W. Barnwell, James H. Adams, and James L. Orr — to proceed to Washington, “to treat with the Government of the United States for the delivery of the forts, magazines, lighthouses, and other real estate, with their appurtenances, within the limits of South Carolina, and also for an apportionment of the public debt, and for a division of all other property held by the Government of the United States, as agent of the confederated States, of which South Carolina was recently a member; and generally to negotiate as to all other measures and arrangements proper to be made and adopted in the existing relation of the parties, and for the continuance of peace and amity between this Commonwealth and the Government at Washington.”

The Commissioners, in the discharge of the duty intrusted to them, arrived in Washington on the 26th of December. Before they could communicate with the President, however — indeed, on the morning after their arrival — they were startled, and the whole country electrified, by the news that, during the previous night, Major Anderson had “secretly dismantled Fort Moultrie,” spiked his guns, burned his gun-carriages, and removed his command to Fort Sumter, which occupied a more commanding position in the harbor. This movement changed the whole aspect of affairs. It was considered by the Government and people of South Carolina as a violation of the implied pledge of a maintenance of the *status quo*; the remaining forts and other public property were at once taken possession of by the State; and the condition of public feeling became greatly exacerbated. An interview between the President and the Commissioners was followed by a sharp correspondence, which was terminated on the 1st of January, 1861, by the return to the Commissioners of their final communication, with an endorsement stating that it was of such a character that the President declined to receive it. The negotiations were thus abruptly broken off.

PART EIGHT. THE CONSTITUTION IN THE CIVIL WAR

CHAPTER L

THE NATURE OF THE WAR

IF the purposes of the new President were different from those of the outgoing executive, they were not disclosed in the inaugural address. There was, however, one significant omission. Nothing was said about coercion. It should be noted that Congress was not in session when hostilities broke out. The policy of the new administration, therefore, was developed under conditions which necessitated a concentration of all the powers of government in the hands of the Chief Executive. When Congress met in special session on July 4, it promptly supplied the necessary legal authorization for the President's acts. On July 13, Congress recognized a state of war as existing; and on July 22, disclaiming any purpose of conquest or subjugation, it declared that its sole object in waging war was to maintain the Constitution and to preserve the Union.

147. *President Lincoln's Inaugural Address.*¹

I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action not provided for in the instrument itself.

Again: If the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade by less than all the parties who made it? One party to a contract may violate it — break it, so to speak — but does it not require all to lawfully rescind it?

¹ March 4, 1861. Richardson, *Messages and Papers of the Presidents*, VI, 7-8.

Descending from these general principles, we find the proposition that in legal contemplation the Union is perpetual confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was "*to form a more perfect Union.*"

But if destruction of the Union by one or by a part only of the States be lawfully possible, the Union is *less* perfect than before the Constitution, having lost the vital element of perpetuity.

It follows from these views that no State upon its own mere motion can lawfully get out of the Union, that *resolves* and *ordinances* to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances.

I therefore consider that in view of the Constitution and the laws the Union is unbroken, and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part, and I shall perform it so far as practicable unless my rightful masters, the American people, shall withhold the requisite means or in some authoritative manner direct the contrary. I trust this will not be regarded as a menace, but only as the declared purpose of the Union that it *will* constitutionally defend and maintain itself.

In doing this there needs to be no bloodshed or violence, and there shall be none unless it be forced upon the national authority. The power confided to me will be used to hold, occupy, and possess the property and places belonging to the Government and to collect the duties and imposts; but beyond what

may be necessary for these objects, there will be no invasion, no using of force against or among the people anywhere. Where hostility to the United States in any interior locality shall be so great and universal as to prevent competent resident citizens from holding the Federal offices, there will be no attempt to force obnoxious strangers among the people for that object. While the strict legal right may exist in the Government to enforce the exercise of these offices, the attempt to do so would be so irritating and so nearly impracticable withal that I deem it better to forego for the time the uses of such offices.

The mails, unless repelled, will continue to be furnished in all parts of the Union. So far as possible the people everywhere shall have that sense of perfect security which is most favorable to calm thought and reflection. The course here indicated will be followed unless current events and experience shall show a modification or change to be proper, and in every case and exigency my best discretion will be exercised, according to circumstances actually existing and with a view and a hope of a peaceful solution of the national troubles and the restoration of fraternal sympathies and affections. . . .

148. *The Call to Arms.*¹

Whereas the laws of the United States have been for some time past and now are opposed and the execution thereof obstructed in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by law:

Now, therefore, I, Abraham Lincoln, President of the United States, in virtue of the power in me vested by the Constitution and the laws, have thought fit to call forth, and hereby do call forth, the militia of the several States of the Union to the aggregate number of 75,000, in order to suppress said combinations and to cause the laws to be duly executed. . . .

¹ April 15, 1861. Richardson, *Messages and Papers of the Presidents*, VI, 13.

149. *Proclamation of Blockade.*¹

Whereas an insurrection against the Government of the United States has broken out in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, and the laws of the United States for the collection of the revenue can not be effectually executed therein conformably to that provision of the Constitution which requires duties to be uniform throughout the United States; and

Whereas a combination of persons engaged in such insurrection have threatened to grant pretended letters of marque to authorize the bearers thereof to commit assaults on the lives, vessels, and property of good citizens of the country lawfully engaged in commerce on the high seas and in waters of the United States; and

Whereas an Executive proclamation has been already issued requiring the persons engaged in these disorderly proceedings to desist therefrom, calling out a militia force for the purpose of repressing the same, and convening Congress in extraordinary session to deliberate and determine thereon:

Now, therefore, I, Abraham Lincoln, President of the United States, with a view to the same purposes before mentioned and to the protection of the public peace and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled and deliberated on the said unlawful proceedings or until the same shall have ceased, have further deemed it advisable to set on foot a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States and of the law of nations in such case provided. . . .

And I hereby proclaim and declare that if any person, under the pretended authority of the said States or under any other pretense, shall molest a vessel of the United States or the persons or cargo on board of her, such person will be held amenable to the laws of the United States for the prevention and punishment of piracy. . . .

¹ April 19, 1861. Richardson, *Messages and Papers of the Presidents*, VI, 14.

150. *President Lincoln's Message of July 4, 1861.*¹

Recurring to the action of the Government, it may be stated that at first a call was made for 75,000 militia, and rapidly following this a proclamation was issued for closing the ports of the insurrectionary districts by proceedings in the nature of blockade. So far all was believed to be strictly legal. At this point the insurrectionists announced their purpose to enter upon the practice of privateering.

Other calls were made for volunteers to serve three years unless sooner discharged, and also for large additions to the Regular Army and Navy. These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.

Soon after the first call for militia it was considered a duty to authorize the Commanding General in proper cases, according to his discretion, to suspend the privilege of the writ of *habeas corpus*, or, in other words, to arrest and detain without resort to the ordinary processes and forms of law such individuals as he might deem dangerous to the public safety. This authority has purposely been exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it are questioned, and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed" should not himself violate them. Of course some consideration was given to the questions of power and propriety before this matter was acted upon. The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it

¹ Richardson, *Messages and Papers of the Presidents*, VI, 24-28 *passim*.

relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, Are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution that "the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it" is equivalent to a provision — is a provision — that such privilege may be suspended when, in cases of rebellion or invasion, the public safety *does* require it. It was decided that we have a case of rebellion and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power; but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it can not be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion. . . .

Our States have neither more nor less power than that reserved to them in the Union by the Constitution, no one of them ever having been a State *out* of the Union. The original ones passed into the Union even *before* they cast off their British colonial dependence, and the new ones each came into the Union directly from a condition of dependence, excepting Texas; and even Texas in its temporary independence, was never designated a State. The new ones only took the designation of States on coming into the Union, while that name was first adopted for the old ones in and by the Declaration of Independence. Therein the "United Colonies" were declared to be "free and independent States;" but even then the object

plainly was not to declare their independence of *one another* or of the *Union*, but directly the contrary, as their mutual pledge and their mutual action before, at the time, and afterwards abundantly show. The express plighting of faith by each and all of the original thirteen in the Articles of Confederation, two years later, that the Union shall be perpetual is most conclusive. Having never been States, either in substance or in name, *outside* of the Union, whence this magical omnipotence of "State rights," asserting a claim of power to lawfully destroy the Union itself? Much is said about the "sovereignty" of the States, but the word even is not in the National Constitution, nor, as is believed, in any of the State constitutions. What is a "sovereignty" in the political sense of the term? Would it be far wrong to define it "a political community without a political superior"? Tested by this, no one of our States, except Texas, ever was a sovereignty; and even Texas gave up the character on coming into the Union, by which act she acknowledged the Constitution of the United States and the laws and treaties of the United States made in pursuance of the Constitution to be for her the supreme law of the land. The States have their status in the Union, and they have no other legal status. If they break from this, they can only do so against law and by revolution. The Union, and not themselves separately, procured their independence and their liberty. By conquest or purchase the Union gave each of them whatever of independence and liberty it has. The Union is older than any of the States, and, in fact, it created them as States. Originally some dependent colonies made the Union, and in turn the Union threw off their old dependence for them and made them States, such as they are. Not one of them ever had a State constitution independent of the Union. Of course it is not forgotten that all the new States framed their constitutions before they entered the Union, nevertheless dependent upon and preparatory to coming into the Union.

Unquestionably the States had the powers and rights reserved to them in and by the National Constitution; but among these surely are not included all conceivable powers, however

mischievous or destructive, but at most such only as were known in the world at the time as governmental powers; and certainly a power to destroy the Government itself had never been known as a governmental — as a merely administrative power. . . .

151. *Proclamation of War.*¹

Whereas on the 15th day of April, 1861, the President of the United States, in view of an insurrection against the laws, Constitution, and Government of the United States . . . did call forth the militia to suppress said insurrection and to cause the laws of the Union to be duly executed, and the insurgents have failed to disperse by the time directed by the President; and . . .

Whereas the insurgents in all the said States claim to act under the authority thereof, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States or in the part or parts thereof in which such combinations exist, nor has such insurrection been suppressed by said States:

Now, therefore, I, Abraham Lincoln, President of the United States, in pursuance of an act of Congress approved July 13, 1861, do hereby declare that the inhabitants of the said States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida (except the inhabitants of that part of the State of Virginia lying west of the Alleghany Mountains and of such other parts of that State and the other States hereinbefore named as may maintain a loyal adhesion to the Union and the Constitution or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of said insurgents) are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the

¹ August 16, 1861. Richardson, *Messages and Papers of the Presidents*, VI, 37-38.

United States is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed; . . .

152. *The Prize Cases*.¹

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force. . . .

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents,— the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars. . . .

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

¹ Supreme Court of the United States, 1863. ² Black, 635.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. . . .

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war because it is an "insurrection."

Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. . . .

On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

CHAPTER LI

PRESIDENTIAL DICTATORSHIP

NONE of the powers assumed by the President immediately after the fall of Fort Sumter was so vigorously denounced as his order to General Scott to suspend the writ of *habeas corpus* at his discretion along the military line between Washington and Philadelphia. In pursuance of this order, one John Merryman, a citizen of Maryland, was arrested upon suspicion of treasonable conduct. His application to the Supreme Court for a writ of *habeas corpus* gave occasion to Chief Justice Taney to record a vigorous dissent from the doctrine that in a crisis the President might suspend the privilege of the writ. The President not only disregarded the protest, but extended the order to suspend the writ along the line from Washington to New York. In this course he was sustained by the Attorney-General, whose opinion may be regarded as a reply to the Chief Justice.

153. *Ex parte John Merryman.*¹

. . . The case, then, is simply this: A military officer residing in Pennsylvania issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as it appears. Under this order his house is entered in the night; he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement. And when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a Justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ. . . .

The clause in the Constitution which authorizes the suspension of the privilege of the writ of *habeas corpus* is in the ninth section of the first article.

This article is devoted to the Legislative Department of the United States, and has not the slightest reference to the Execu-

¹ McPherson, *Political History of the United States during the Great Rebellion*, 155-56.

tive Department. It begins by providing "that all legislative powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants and legislative powers which it expressly prohibits, and, at the conclusion of this specification, a clause is inserted giving Congress "the power to make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof."

The power of legislation granted by this latter clause is by its words carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles essential to the liberty of the citizen and to the rights and equality of the States by denying to Congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined that there should be no room to doubt, where rights of such vital importance were concerned, and accordingly this clause is immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend; and the great importance which the framers of the Constitution attached to the privilege of the writ of *habeas corpus*, to protect the liberty of the citizen, is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers; and even in these cases the power is denied and its exercise prohibited unless the public safety shall require it. It is true that in the cases mentioned Congress is of necessity the judge of whether the public safety does or does not require it; and its judgment is conclusive. But the introduction of these words is a standing admonition to the legis-

lative body of the danger of suspending it and of the extreme caution they should exercise before they give the Government of the United States such power over the liberty of a citizen.

It is the second article of the Constitution that provides for the organization of the Executive Department, and enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizens now claimed was intended to be conferred on the President, it would undoubtedly be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the Executive power shall be vested in a President of the United States of America, to hold his office during the term of four years, and then proceeds to describe the mode of election, and to specify in precise and plain words the powers delegated to him and the duties imposed upon him. And the short term for which he is elected, and the narrow limits to which his power is confined, show the jealousy and apprehensions of future danger which the framers of the Constitution felt in relation to that department of the Government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English Government which were considered as dangerous to the liberty of the subject, and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the Government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office. He is, from necessity, and the nature of his duties, the Commander-in-Chief of the army and navy, and of the militia, when called into actual service. But no appropriation for the support of the army can be made by Congress for a longer term than two years, so that it is in the power of the succeeding House of Representatives to withhold the appropriation for its support, and thus disband it, if, in their judgment, the President used or designed to use it for improper purposes. And although the militia, when in actual

service, are under his command, yet the appointment of the officers is reserved to the States, as a security against the use of the military power for purposes dangerous to the liberties of the people or the rights of the States.

So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of Government, nor make a treaty with a foreign nation or Indian tribe without the advice and consent of the Senate, and cannot appoint even inferior officers unless he is authorized by an act of Congress to do so. He is not empowered to arrest any one charged with an offense against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the Constitution expressly provides that no person "shall be deprived of life, liberty, or property without due process of law;" that is, judicial process. And even if the privilege of the writ of *habeas corpus* was suspended by act of Congress, and a party not subject to the rules and articles of war was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal, for the article in the Amendments to the Constitution immediately following the one above referred to—that is, the sixth article—provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

And the only power, therefore, which the President possesses, where the "life, liberty, or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that

the laws be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution as they are expounded and adjudged by the coördinate branch of the Government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the Executive arm. But in exercising this power, he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

With such provisions in the Constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of the privilege of the writ of *habeas corpus*, or arrest a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws if he takes upon himself legislative power by suspending the writ of *habeas corpus*— and the judicial power, also, by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessities of government for self-defense, in times of tumult and danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution, and neither of its branches— executive, legislative, or judicial— can exercise any of the powers of government beyond those specified and granted.

154. *Opinion of Attorney-General Bates.*¹

I am clearly of opinion that, in a time like the present, when the very existence of the nation is assailed by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against

¹ July 5, 1861. McPherson, *Political History of the United States of America during the Great Rebellion*, 159-61 *passim*.

whom there is probable cause for suspicion of such criminal complicity. And I think this position can be maintained, in view of the principles already laid down, by a very plain argument.

The Constitution requires the President, before he enters upon the execution of his office, to take an oath that he "will faithfully execute the office of President of the United States and will, to the best of his ability, preserve, protect, and defend the Constitution of the United States." . . .

The last clause of the oath is peculiar to the President. All the other officers of Government are required to swear only "to support this Constitution;" while the President must swear to "preserve, protect, and defend" it, which implies the power to perform what he is required in so solemn a manner to undertake. And then follows the broad and compendious injunction to "take care that the laws be faithfully executed." And this injunction, embracing as it does all the laws — Constitution, treaties, statutes — is addressed to the President alone, and not to any other department or office of the Government. And this constitutes him, in a peculiar manner, and above all other officers, the guardian of the Constitution — its preserver, protector, and defender. . . .

It is the President's bounden duty to put down the insurrection, as, in the language of the act of 1795, the "combinations are too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." And this duty is imposed upon the President for the very reason that the courts and the marshals are too weak to perform it. The manner in which he shall perform that duty is not prescribed by any law, but the means of performing it are given in the plain language of the statutes, and they are all means of force — the militia, the Army, and the Navy. The end, the suppression of the insurrection, is required of him; the means and instruments to suppress it are lawfully in his hands; but the manner in which he shall use them is not prescribed, and could not be prescribed, without a fore-knowledge of all the future changes and contingencies of the insurrection. He is therefore necessarily thrown upon his discretion as to the

manner in which he will use his means to meet the varying exigencies as they arise. If the insurgents assail the nation with an army he may find it best to meet them with an army, and suppress the insurrection on the field of battle. If they seek to prolong the rebellion and gather strength by intercourse with foreign nations, he may choose to guard the coast and close the ports with a navy, as one of the most efficient means to suppress the insurrection. And if they employ spies and emissaries to gather information, to forward secret supplies, and to excite new insurrections in aid of the original rebellion, he may find it both prudent and humane to arrest and imprison them. And this may be done either for the purpose of bringing them to trial and condign punishment for their crimes, or they may be held in custody for the milder end of rendering them powerless for mischief until the exigency is past.

In such a state of things the President must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him, to enable him to discharge his constitutional and legal duty; that is, to suppress the insurrection and execute the laws. And this discretionary power of the President is fully admitted by the Supreme Court in the case of *Martin vs. Mott*. . . .

The insurrection itself is purely political. Its object is to destroy the political government of this nation, and to establish another political government upon its ruins. And the President, as the chief civil magistrate of the nation, and the most active department of the Government, is eminently and exclusively political in all its principal functions. As the political chief of the nation, the Constitution charges him with its preservation, protection, and defense, and requires him to take care that the laws be faithfully executed. . . . He has no judicial powers. And the Judiciary Department has no political powers, and claims none, and therefore (as well as for other reasons already assigned) no court or judge can take cognizance of the political acts of the President, or undertake to revise and reverse his political decisions.

The jurisdiction exercised under the writ of *habeas corpus* is in the nature of an appeal, (4 Cr. 75,) for, as far as concerns the right of the prisoner, the whole object of the process is to re-examine and reverse or affirm the acts of the person who imprisoned him. And I think it will hardly be seriously affirmed that a judge, at chambers, can entertain an appeal, in any form, from a decision of the President of the United States, and especially in a case purely political. . . .

If by the phrase the suspension of the privilege of the writ of *habeas corpus*, we must understand a repeal of all power to issue the writ, then I freely admit that none but Congress can do it. But if we are at liberty to understand the phrase to mean, that in case of a great and dangerous rebellion like the present, the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion that the President has lawful power to suspend the privilege of persons arrested under such circumstances; for he is especially charged by the Constitution with the "public safety," and he is the sole judge of the emergency which requires his prompt action.

This power in the President is no part of his ordinary duty in time of peace; it is temporary and exceptional, and was intended only to meet a pressing emergency, when the judiciary is found to be too weak to insure the public safety — when (in the language of the act of Congress) there are "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." Then and not till then, has he the lawful authority to call to his aid the military power of the nation, and with that power perform his great legal and constitutional duty to suppress the insurrection. And shall it be said that when he has fought and captured the insurgent army, and has seized their secret spies and emissaries, he is bound to bring their bodies before any judge who may send him a writ of *habeas corpus*, "to do, submit to, and receive whatsoever the said judge shall consider in that behalf?" . . .

CHAPTER LII

THE WAR POWER AND CIVIL RIGHTS

THE theory upon which the Federal Government waged war led to many difficulties in actual practice. By the terms of the proclamation declaring a blockade, privateering was to be treated as piracy, but President Lincoln shrank from the consequences when crews of captured privateers were brought to trial. It was well understood that the Confederate Government would retaliate. In respect to life and liberty, therefore, the administration simply fell back upon the rules and practices of international law. In dealing with the property of secessionists, greater difficulty was experienced. During the second session of the Thirty-seventh Congress, various bills were considered which contemplated the punishment of secessionists by the confiscation of their property. At the same time, it was generally hoped that the question of slavery would receive a definite settlement. Confiscation and emancipation were two problems which created bitter dissensions in the ranks of the governing party. The following extracts from the debates in Congress represent the ultra-radical and the conservative views. The Confiscation Act adopted July 17, 1862, was a compromise measure. Briefly stated, it made rebellion a felony and fixed severe penalties for treason and rebellion. It directed the seizure of all the property of specified classes of persons engaged directly and indirectly in rebellion, and by action *in rem* in the courts of the United States provided for its condemnation and sale as enemies' property. When brought within the military or civil jurisdiction of the United States, by capture or otherwise, slaves of persons in rebellion were declared free. Fugitive slaves were not to be given up unless their owners declared under oath that they had not aided the rebellion. The President was authorized to employ negroes as soldiers and to make provision for the colonization of freedmen in some foreign country.

155. *Senator Collamer on Confiscation of Rebel Property.*¹

Mr. President, I have already remarked that in whatever we do we must keep fairly within the limitations of the Constitution. It will not do to say that because we need to do this thing, because it is necessary in our judgment, we will do it for that reason. The limitations and prohibitions of power in the Constitution were put there on purpose to prevent our doing such things when we wanted to do them. . . .

¹ April 24, 1862. *Congressional Globe*, 37 Cong., 2 Sess., 1860-10, *passim*.

A considerable part of the projects before the two Houses propose to confiscate people's property, real and personal, either all of the people in the South, or classes of them. How are you to do it without trying and convicting the men, as the Constitution says men shall be punished only in that way, and shall not be deprived of their property but according to due process of law? There has been a recent discovery that there is a certain term — a law phrase — which, perhaps, the people will not understand, that has a vast deal of hocus pocus in it, by which we can get rid of all that sort of business. What is it? It is what is called proceedings *in rem*. A man has been guilty of treason. Well, what is your Constitution? Try him on indictment, by a jury. You cannot punish him in any other way; you cannot deprive him of his property for it in any other way. "To be sure," say gentlemen, "that is a troublesome thing; but there is a certain *in rem* by which we will let the man entirely alone, but will seize hold of such property as he has got, and we will punish that by way of proceedings *in rem*; and by and by, when we catch him, we will try him and hang him, though that is another punishment, and the Constitution says we shall not punish him but once." So you have proceedings *in rem*, and then proceedings *in personam*! That is the discovery!

Now, Mr. President, what are these proceedings *in rem*, where you do not have any jury? What is the form, what is the character of them? They are trials before prize courts or admiralty courts. In what cases? It is when a thing is the instrument of wrong, so that in legal estimation it is a guilty thing. Then you may proceed with that thing. If a man is trying to smuggle goods, you know he cannot be guilty of smuggling without goods. The goods are the instrument of the wrong; and therefore there is a proceeding by which you may take and condemn the thing, for that is what *rem* means, I believe. So, too, if a pirate's vessel, with which he marauds upon the seas against the nations, is taken, it is a guilty thing, it is the instrument of wrong, and you proceed against it. So when men pursue the slave trade with ships, they are the instruments of the wrong, and you proceed against them *in*

rem. In proceeding *in rem* you do not give the thing notice because it cannot answer; you do not give it a trial by jury, as when you proceed against the man. . . .

This proceeding *in rem* is spoken of in a manner which would be rather ludicrous if it were not so serious an affair, but it is no slight thing to say that when a man has committed a crime like that of treason, and is within the reach of your process, you may proceed to strip him of his property or do anything you can do, as you say, and then punish him afterwards. Is it a rule that you must do on such occasions whatever you have physical means to do, and therefore, if you cannot reach him in any other way, if he has gone out of the reach of process, you must take his property because you have nothing else to take? If a man is guilty of counterfeiting your Treasury notes, and you cannot catch him, if he is out of the way, why not, on the same principle, have a law to cut his wife's throat if he has no property? Sir, the whole idea in my estimation is entirely wrong, and an attempt to do that which the provision of the Constitution was intended to guard against. It nowhere says that, if you cannot punish the man because he gets out of the reach of process, therefore you may disregard the provisions of the Constitution and take some other way. There is nothing of that kind in the Constitution. I take it we have all our powers from the Constitution, and that in itself inhibits to us by absolute abnegation that we shall exercise any powers but what are there granted, and all the rest were reserved from us.

Mr. President, this word "confiscate" literally means "put into the Treasury," and it can legitimately be applied only to that out of which you can get something to put into the Treasury. That is truly the meaning of the term. But, sir, when we legislate for the people of the Southern seceded States we do it because they are our people. We treat all this secession as void, and I take it, that that which is void can have no legal effect. It can have no effect to confiscate anybody's goods or annihilate the States; nor can it have any other legal effect whatever. When we legislate for that people as our people in common with the rest of our citizens, we must allow to them all

the rights and privileges, immunities and protections that the Constitution gives to citizens of the Union. I have therefore made the remarks which I have made upon this question on the basis that we cannot take courses in relation to them, by laws made by us over them as a people bound by those laws, on any other grounds than those which apply to all our people. If we make laws by our power under the Constitution we must regard the prohibitions of the Constitution, else we are lawless. . . .

It is said, however, that we are at war, and that we have become elevated to the privileges, and are entitled to exercise the rights, of a belligerent; that this power of confiscation is a sort of war power over our own citizens that we have a right to exercise in the capacity of a belligerent. . . . Undoubtedly, so far as regards the conducting of the war, it should be conducted according to the laws of nations, and, if you please, according to the usages of nations in these times of civilization; but when we come to the rights of belligerents, can we apply them? When we conquer a country with which we are at war, we own the public property there. Now, we have conquered Tennessee, if you please. Do we own the capitol at Nashville to-day? Do we own any of the universities and colleges and public property of the State of Tennessee to-day? If they are treated as belligerents, then when you conquer the country, the property in the land remains in the individuals who owned it before, and the nation acquires no title to it by conquest. Here is an attempt to get possession of all that property of individuals who have been concerned in this rebellion. And how? As a belligerent. According to the laws of nations, a belligerent does not get it. I know that the Constitution provides that Congress may issue letters of marque and reprisal, and make regulations in relation to captures or seizures by sea and land. That looks to a state of war, undoubtedly. What is a seizure or capture? What is the meaning of the term? Something that you take, make prize of, carry away. Can you carry away the farms of an enemy? Are they the subject of capture? Not at all.

But, Mr. President, when, after a war with another nation,

you make peace with it, all matters are ended, depending on the form of your articles of peace. It may be the *status ante bellum*, it may be *uti possidetis*, depending on the terms of your treaty; but all matters are then ended. Now, when we have conquered these people, taken military possession of the country, can we not punish the men who have been in rebellion; can we not render it legitimate to hang them? Certainly. Could you do so with enemies with whom you have made war and peace? No; but in such cases, when peace was declared, the past would be wiped out.

Again, to treat with them and treat about them as being belligerents, is to acknowledge them, so far as this war is concerned, as a coequal power. We have complained that any foreign nation acknowledged and recognized them as in a state of belligerency. We thought it was pretty hard usage to us. I do not see it in that light exactly; but at any rate, especially after what has been said to the other nations of the world by our functionary and correspondent of the State Department, it ill becomes us to take measures founded on the ground that they are coequals and belligerents, and that we may make laws accordingly. This legislating for that people as bound by the laws that we here make, and at the same time legislating for them as enemies and belligerents, not bound by the laws we make, is to my mind utterly inconsistent, utterly irreconcilable, and I shall not, therefore, make any further remarks, in relation to what might by possibility be done by us as belligerents. . . .

156. *Senator Sumner on the Rights of War.*¹

The War Powers of Congress are derived from the Constitution, but when once set in motion, are without any restraint from the Constitution, so that what is done in pursuance of them is at the same time under the Constitution and outside the Constitution. It is under the Constitution in its beginning and origin. It is outside the Constitution in the latitude with which it may be conducted. But, whether under the Constitution or outside the Constitution, all that is done in pursuance of

¹ June 27, 1862. *Congressional Globe*, 37 Cong., 2 Sess., 2963-64 *passim*.

the War Powers is constitutional. It is easy to cry out against it; it is easy, by misapplication of the Constitution, to call it in question; but it is only by such a misapplication, or by a senseless cry, that its complete constitutionality can for a moment be drawn into doubt.

The language of the Constitution is plain and ample. It confers upon Congress all the specific powers incident to war, and then further authorizes it "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." . . .

The bills now under consideration are obviously founded on the War Powers. . . .

. . . The Constitution is entirely inapplicable. Sacred and inviolable, the Constitution is made for friends who acknowledge it, and not for enemies who disavow it; and it is made for a state of peace, and not for the fearful exigencies of war. War, as it comes, treads down within its sphere all rights except the Rights of War. Born of violence, and looking to violence for victory, it discards all limitations, except such as are supplied by the Rights of War. Once begun, war is a law unto itself; or, in other words, it has a law of its own, which is a part of itself. And just in proportion as you seek to moderate it by constitutional limitations, do you take from war something of its efficiency. In vain do you equip our soldiers with the best of weapons or send into the field the most powerful batteries, the latest invention of consummate science, if you direct them all in full career to stand still for an indictment or other due process of law, or at least for the reading of the riot act. But, sir, if you undertake to limit the Rights of War by the Constitution, where are you to stop? If the Constitution can interfere with one, it can interfere with all. If the Constitution can wrest from Government the weapons of confiscation and liberation, there is no other weapon in the whole arsenal of war which it may not take also.

Sir, the Constitution is guilty of no such absurdity. It was made by wise men, familiar with public law, who saw clearly the difference between peace and war, and who established

powers accordingly. In circumscribing the Peace Powers with constitutional checks, they left untouched the War Powers. They declared that, in the administration of the Peace Powers, all should be able to invoke the Constitution as a constant safeguard. But, in bestowing upon the Government War Powers without limitation, they embodied in the Constitution all the Rights of War as completely as if those rights had all been expressly set down and enumerated; and among the first of these rights is the right to disregard all the rights of peace. . . .

At the risk of repetition, but for the sake of clearness, let me now repeat the propositions on which I confidently rest.

1. The Rights of Sovereignty are derived from the Constitution, and can be exercised only in conformity with the requirements of the Constitution: so that all penal statutes, punishing treason, must carefully comply with these requirements. . . .

2. The Rights of War are under the Constitution in their origin, but outside the Constitution in their execution. In other words the Constitution confers the Rights of War, but sets no limits to them, so that Statutes to enforce them are not to be regarded as mere penal statutes, restricted by the Constitution. But these rights belong to a state of war, and necessarily cease with the war. This is the case of the House bills now under discussion.

3. Rebels in arms are public enemies, who can claim no safeguard from the Constitution, and they may be pursued and conquered according to the Rights of War.

4. All rebels are criminals, liable to punishment according to penal statutes, and in all proceedings against them as such, they are surrounded by the safeguards of the Constitution.

5. The Rights of War may be enforced by act of Congress, which is the highest form of the national will. . . .

157. *Representative Thomas on Confiscation.*¹

. . . The positions assumed by the friends of these measures are, that we may deal with those engaged in this rebellion as

¹ May 24, 1862. *Congressional Globe*, 37 Cong., 2 Sess., App., 219-20 *passim*.

public enemies and as traitors; that regarding them as enemies, we may use against them all the powers granted by the law of nations; and viewing them as rebels or traitors, we may use against them all the powers granted by the Constitution; and that in either view, these bills can be sustained.

Dealing with them as public enemies, it is said that under the existing law of nations we have a clear right to confiscate the entire private property on the land as well as the sea, real and personal, of those in arms, and of non-combatants who may in any way give aid and comfort to the rebellion. . . . I deny the proposition, Mr. Speaker. . . . Such is not the law of nations.

To give a plausible aspect to the proposition, the advocates of this bill have gone back to Grotius and to Bynkershoek for the rules of war, and even then have omitted to give what Grotius calls the *temperamenta*, or restraints upon the rules. You might as well attempt to substitute the code of Moses for the beatitudes of the Gospel. Anything can be established by such resort to the authorities. By the older writers you can prove not only all the property of the vanquished may be taken, but that every prisoner may be put to death. . . .

Commerce, civilization, Christian culture, have tempered and softened the rigor of the ancient rules; and the State which should to-day assume to put them in practice would be an out-cast from the society of nations. Nay, more, they would combine, and rightfully combine, to stay its hand. For the modern law of war, you must look to the usages of civilized States, and to the publicists who have explained and enforced them. Those usages constitute themselves the laws of war.

In relation to the capture and confiscation of private property on the land, I venture to say, with great confidence, and after careful examination, that the result of the whole matter has never been better stated than by our own great publicist, Mr. Wheaton:

"But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war.

Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country." — *Elements of International Law*, p. 421. . . .

The property to which the bill applies is not, under the law of nations, prize, it is not booty, it is not contraband of war. It is not enforced military contribution. It is not property used or employed in the war or in resistance to the laws, and, therefore, clearly to be distinguished from that covered by the statute of August 6, 1861. It is private property outside of the conflict of arms, forfeited not because it is the instrument of offence, but as a penalty for the crime of the owner. The disguise of the proceeding *in rem* is too thin and transparent. No lawyer, no man of common sense will be deceived by it. The proceeding, in spirit, in substance, and in effect, is the punishment of treason by the forfeiture of a man's entire estate, real and personal, without trial by jury, and in utter disregard of the provision of the Constitution which limits the forfeiture for treason to the life of the person attainted. . . .

CHAPTER LIII

MARTIAL LAW AND THE CONSTITUTION

MILITARY arrests continued through the war, not only in the border States, but in States remote from the theater of war. The procedure of the Government was most irregular; but in September, 1862, the President definitely assumed the power to proclaim martial law generally. Military districts under the control of provost marshals were established; and "all rebels and insurgents, their aiders and abettors, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to the rebels," were declared "subject to martial law and liable to trial and punishment by courts martial or military commission." Over against the radical utterances of Thaddeus Stevens, for whom no war measures were too strong, one must put the sober judgment of Benjamin J. Curtis in his widely read pamphlet on *The Executive Power*. It was not until after the war that an authoritative opinion relative to these military tribunals was secured from the Supreme Court.

158. *Power of Congress to Create a Dictator.*¹

. . . When the Constitution is repudiated, and set at defiance by an armed rebellion, too powerful to be quelled by peaceful means, or by any rules provided for the regulation of the land and naval forces, the Constitution itself grants to the President and Congress a supplemental power, which it was impossible to define, because it must go on increasing and varying according to the increasing and varying necessities of the nation. The Constitution makes it the duty of the President to see that all the laws be executed. If any unforeseen and uncontrollable emergency should arise endangering the existence of the Republic, and there were no legal provision or process by which the danger could be averted, the section of the Constitution which says that "the President shall take care that the laws shall be faithfully executed" creates him, for the time being, as much a dictator as a decree of the Roman senate that the consul "should take care that the commonwealth should

¹ Representative Stevens, January 22, 1862. *Congressional Globe*, 37 Cong., 2 Sess., 440 *passim*.

receive no detriment" made him a dictator, and gave him all power necessary for the public safety, whether the means were inscribed on their tables or not. Of course such power would be limited by the necessity, and ought to exist only until Congress could be convened. The Romans, I believe, limited theirs to six months. But when Congress would assemble, they would possess the same full powers. They are authorized to raise armies and navies; to organize and call out the militia "to suppress insurrection and repel invasion." Lest these enumerated acts should prove insufficient, it wisely provides, that —

"Congress shall have power to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The Government is empowered to suppress insurrection; its Executive is enjoined "to see all the laws faithfully executed;" Congress is granted power to pass all laws necessary to that end. If no other means were left to save the Republic from destruction, I believe we have power, under the Constitution and according to its express provision, to declare a dictator, without confining the choice to any officer of the Government. . . .

159. "*The Executive Power.*"¹

The only supposed source or measure of these vast powers appears to have been designated by the President, in his reply to the address of the Chicago clergymen, in the following words: "Understand, I raise no objection against it on legal or constitutional grounds; for, *as commander-in-chief of the army and navy, in time of war, I suppose I have a right to take any measure which may best subdue the enemy.*" This is a clear and frank declaration of the opinion of the President respecting the origin and extent of the power he supposes himself to possess; and, so far as I know, *no source of these powers other than the authority of commander-in-chief in time of war, has ever been suggested.* . . .

¹ Benjamin R. Curtis, *The Executive Power* (1862), *passim*.

. . . Indeed, the proclamation of September 24, 1862, followed by the orders of the war department, intended to carry it into practical effect, are manifest assumptions, by the President, of powers delegated to the Congress and to the judicial department of the government. It is a clear and undoubted prerogative of Congress alone, to define all offences, and to affix to each some appropriate and not cruel or unusual punishment. But this proclamation and these orders create new offences, not known to any law of the United States. "Discouraging enlistments," and "any disloyal practice," are not offences known to any law of the United States. At the same time, they may include, among many other things, acts which are offences against the laws of the United States, and, among others, treason. Under the Constitution and laws of the United States, except in cases arising in the land and naval forces, every person charged with an offence is expressly required to be proceeded against, and tried by the judiciary of the United States and a jury of his peers; and he is required by the Constitution to be punished, in conformity with some act of Congress applicable to the offence proved, enacted before its commission. But this proclamation and these orders remove the accused from the jurisdiction of the judiciary; they substitute a report, made by some deputy provost marshal, for the presentment of a grand jury; they put a military commission in place of a judicial court and jury required by the Constitution; and they apply the discretion of the commission and the President, fixing the degree and kind of punishment, instead of the law of Congress fixing the penalty of the offence. . . .

When the Constitution says that the President shall be the commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States, does it mean that he shall possess military power and command *over all citizens of the United States*; that, by military edicts, he may control all citizens, as if enlisted in the army or navy, or in the militia called into the actual service of the United States? Does it mean that he may make himself a legislator, and enact penal laws govern-

ing the citizens of the United States, and erect tribunals, and create offices to enforce his penal edicts upon citizens? Does it mean that he may, by a prospective executive decree, repeal and annul the laws of the several States, which respect subjects reserved by the Constitution for the exclusive action of the States and the people? The President is the commander-in-chief of the army and navy, not only by force of the Constitution, but under and subject to the Constitution, and to every restriction therein contained, and to every law enacted by its authority, as completely and clearly as the private in his ranks. . . .

In time of war, a military commander, whether he be the commander-in-chief, or one of his subordinates, must possess and exercise powers both over the persons and the property of citizens which do not exist in time of peace. But he possesses and exercises such powers, *not in spite of the Constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordination thereto*. The general who moves his army over private property in the course of his operations in the field, or who impresses into the public service means of transportation, or subsistence, to enable him to act against the enemy, or who seizes persons within his lines as spies, or destroys supplies in immediate danger of falling into the hands of the enemy, uses authority unknown to the Constitution and laws of the United States in time of *peace*; but not unknown to that Constitution and those laws in time of *war*. The power to declare war, includes the power to use the customary and necessary means effectually to carry it on. As Congress may institute a state of war, it may legislate into existence and place under executive control the means for its prosecution. And, in time of war, without any special legislation, not the commander-in-chief only, but every commander of an expedition, or of a military post, is lawfully empowered by the Constitution and laws of the United States to do whatever is necessary, and is sanctioned by the laws of war, to accomplish the lawful objects of his command. But it is obvious that this implied authority must find early limits somewhere. If it were

admitted that a commanding general in the field might do whatever in his discretion might be necessary to subdue the enemy, he could levy contributions to pay his soldiers; he could force conscripts into his service; he could drive out of the entire country all persons not desirous to aid him; — in short, he would be the absolute master of the country for the time being.

No one has ever supposed — no one will now undertake to maintain — that the commander-in-chief, in time of war, has any such lawful authority as this.

What, then, is his authority over the persons and property of citizens? I answer, that, over all persons enlisted in his forces he has military power and command; that over all persons and property *within the sphere of his actual operations in the field*, he may lawfully exercise such restraint and control as the successful prosecution of his particular military enterprise may, in his honest judgment, absolutely require; and upon such persons as have committed offences against any article of war, he may, through appropriate military tribunals, inflict the punishment prescribed by law. *And there his lawful authority ends.*

160. *Ex parte Milligan.*¹

Mr. Justice Davis delivered the opinion of the Court:

. . . The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man? . . .

¹ Supreme Court of the United States, 1867. 4 Wallace, 2.

. . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction." . . .

. . . One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior. . . .

Another guarantee of freedom was broken when Milligan was denied a trial by jury. . . .

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared

the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of State or political necessity. . . .

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is the judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for, and to the exclusion of, the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. . . .

. . . Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the persons arrested in answer to a writ of

habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on States in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal States should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must

be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. . . .

CHAPTER LIV

EMANCIPATION

THE evolution of the policy of the administration in dealing with rights of property in slaves may be traced by the following selections. Regarding the Emancipation Proclamation, it has been said trenchantly that, "as indicating the definitive adoption by the Executive of a radical policy on a vital issue, the proclamation was of the highest importance; but it did not strike the shackles from a single slave." The legal status of the freedmen was not established until the adoption of the Thirteenth Amendment. In the course of its opinion in the Slaughter-House Cases, the Supreme Court gave a definitive interpretation to this amendment.

161. *Contraband of War.*¹

The important question of the proper disposition to be made of fugitives from service in States in insurrection against the Federal Government, to which you have again directed my attention in your letter of July 30, has received my most attentive consideration.

It is the desire of the President that all existing rights, in all the States, be fully respected and maintained. The war now prosecuted on the part of the Federal Government is a war for the Union, and for the preservation of all constitutional rights of States, and the citizens of the States, in the Union. Hence no question can arise as to fugitives from service within the States and Territories in which the authority of the Union is fully acknowledged. The ordinary forms of judicial proceeding, which must be respected by military and civil authorities alike, will suffice for the enforcement of all legal claims. But in States wholly or partially under insurrectionary control, where the laws of the United States are so far opposed and resisted that they cannot be effectually enforced, it is obvious that rights dependent on the execution of those laws must, temporarily, fail; and it is equally obvious that rights dependent on

¹ Secretary of War to General Butler, August 8, 1861. McPherson, *Political History of the United States during the Great Rebellion*, 245.

the laws of the States within which military operations are conducted must be necessarily subordinated to the military exigencies created by the insurrection, if not wholly forfeited by the treasonable conduct of parties claiming them. To this general rule rights to services can form no exception.

The act of Congress approved August 6, 1861, declares that if persons held to service shall be employed in hostility to the United States, the right to their services shall be forfeited, and such persons shall be discharged therefrom. It follows of necessity that no claim can be recognized by the military authorities of the Union to the services of such persons when fugitives.

A more difficult question is presented in respect to persons escaping from the service of loyal masters. It is quite apparent that the laws of the State, under which only the services of such fugitives can be claimed, must needs be wholly, or almost wholly, suspended, as to remedies, by the insurrection and the military measures necessitated by it. And it is equally apparent that the substitution of military for judicial measures for the enforcement of such claims must be attended by great inconveniences, embarrassments, and injuries.

Under these circumstances it seems quite clear that the substantial rights of loyal masters will be best protected by receiving such fugitives, as well as fugitives from disloyal masters, into the service of the United States, and employing them under such organizations and in such occupations as circumstances may suggest or require. Of course a record should be kept showing the name and description of the fugitives, the name and the character, as loyal or disloyal, of the master, and such facts as may be necessary to a correct understanding of the circumstances of each case after tranquillity shall have been restored. Upon the return of peace, Congress will, doubtless, properly provide for all the persons thus received into the service of the Union, and for just compensation to loyal masters. In this way only, it would seem, can the duty and the safety of the Government and the just rights of all be fully reconciled and harmonized.

You will therefore consider yourself as instructed to govern your future action, in respect to fugitives from service, by the principles herein stated, and you will report from time to time, and at least twice in each month, your action in the premises to this Department. You will, however, neither authorize nor permit any interference, by the troops under your command, with the servants of peaceful citizens in house or field; nor will you, in any way, encourage such servants to leave the lawful service of their masters; nor will you, except in cases where the public safety may seem to require, prevent the voluntary return of any fugitive to the service from which he may have escaped.

162. *Forfeiture of Slaves.*¹

. . . It is also provided that the slaves of persons convicted under these sections shall be free. I think there is an unfortunate form of expression, rather than a substantial objection, in this. It is startling to say that Congress can free a slave within a State, and yet if it were said that the ownership of the slave had first been transferred to the nation, and Congress had then liberated him, the difficulty would at once vanish. And this is the real case. The traitor against the General Government forfeits his slave at least as justly as he does any other property; and he forfeits both to the Government against which he offends. The Government, so far as there can be ownership, thus owns the forfeited slaves, and the question for Congress in regard to them is, "shall they be made free or sold to new masters?" I perceive no objection to Congress deciding in advance that they shall be free. To the high honor of Kentucky, as I am informed, she has been the owner of some slaves by *escheat*, and has sold none, but liberated all. I hope the same is true of some other States. Indeed, I do not believe it will be physically possible for the General Government to return persons so circumstanced to actual slavery. I believe there would

¹ Richardson, *Messages and Papers of the Presidents*, vi, 85-86. Veto message on the Confiscation Bill. President Lincoln concluded to approve the bill, but sent to Congress, July 17, 1862, a copy of the veto message which he had drafted.

be physical resistance to it, which could neither be turned aside by argument nor driven away by force. In this view I have no objection to this feature of the bill. . . .

163. *Power of the President to Emancipate Slaves.*¹

The liberation of slaves is looked upon as a means of embarrassing or weakening the enemy, or of strengthening the military power of our army. If slaves be treated as contraband of war, on the ground that they may be used by their masters to aid in prosecuting war, as employees upon military works, or as laborers furnishing by their industry the means of carrying on hostilities; or if they be treated as, in law, belligerents, following the legal condition of their owners; or if they be deemed loyal subjects having a just claim upon the government to be released from their obligations to give aid and service to disloyal and belligerent masters, in order that they may be free to perform their higher duty of allegiance and loyalty to the United States; or if they be regarded as subjects of the United States, liable to do military duty; or if they be made citizens of the United States, and soldiers; or if the authority of the masters over their slaves is the means of aiding and comforting the enemy, or of throwing impediments in the way of the government, or depriving it of such aid and assistance in successful prosecution of the war, as slaves would and could afford, if released from the control of the enemy, — or if releasing the slaves would embarrass the enemy, and make it more difficult for them to collect and maintain large armies; in either of these cases, the taking away of these slaves from the “aid and service” of the enemy, and putting them to the aid and service of the United States, is justifiable as an act of war. The ordinary way of depriving the enemy of slaves is by declaring emancipation. . . .

The Constitution confers on the Executive, when in actual war, full belligerent powers. The emancipation of enemy's slaves is a belligerent right. It belongs exclusively to the

¹ Whiting, *War Powers of the President* (1862), 66-68 *passim*. The author was solicitor-general in the War Department.

President, as commander-in-chief, to judge whether he shall exercise his belligerent right to emancipate slaves in those parts of the country which are in rebellion. If exercised in fact, and while the war lasts, his act of emancipation is conclusive and binding forever on all the departments of government, and on all persons whatsoever. . . .

164. *Emancipation Proclamation.*¹

WHEREAS, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, a proclamation was issued by the President of the United States, containing, among other things, the following, to wit:

"That, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any state or designated part of a state, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever, free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

"That the Executive will, on the first day of January aforesaid, by proclamation, designate the states and parts of states, if any, in which the people thereof, respectively, shall then be in rebellion against the United States; and the fact that any state, or the people thereof, shall on that day be in good faith represented in the Congress of the United States, by members chosen thereto at elections wherein a majority of the qualified voters of such states shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such state, and the people thereof, are not then in rebellion against the United States."

Now, therefore, I, ABRAHAM LINCOLN, President of the United States, by virtue of the power in me vested as commander-in-chief of the army and navy of the United States, in

¹ *United States Statutes at Large*, XII, 1268-69. January 1, 1863.

time of actual armed rebellion against the authority and Government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and in accordance with my purpose so to do, publicly proclaimed for the full period of one hundred days from the day first above mentioned, order and designate as the states and parts of states wherein the people thereof, respectively, are this day in rebellion against the United States, the following, to wit:

Arkansas, Texas, Louisiana, (except the parishes of St. Bernard, Plaquemines, Jefferson, St. John, St. Charles, St. James, Ascension, Assumption, Terre Bonne, Lafourche, St. Mary, St. Martin, and Orleans, including the city of New Orleans,) Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia, (except the forty-eight counties designated as West Virginia, and also the counties of Berkeley, Accomac, Northampton, Elizabeth City, York, Princess Ann, and Norfolk, including the cities of Norfolk and Portsmouth,) and which excepted parts are for the present left precisely as if this proclamation were not issued.

And by virtue of the power and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated states and parts of states are, and henceforward shall be, free; and that the Executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.

And I further declare and make known that such persons, of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

And upon this act, sincerely believed to be an act of justice,

warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind and the gracious favor of Almighty God.

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165. *Resolution of Congress freeing Soldiers' Families.*¹

Resolved . . . , That, for the purpose of encouraging enlistments and promoting the efficiency of the military and naval forces of the United States, it is hereby enacted that the wife and children, if any he have, of any person that has been, or may be, mustered into the military or naval service of the United States, shall, from and after the passage of this act, be forever free, any law, usage, or custom whatsoever to the contrary notwithstanding. . . .

166. *The Thirteenth Amendment.*²

ARTICLE XIII

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

167. *Judicial Interpretation of the Thirteenth Amendment.*³

. . . The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and

¹ *United States Statutes at Large*, XIII, 571. March 3, 1865.

² This amendment went into effect December 18, 1865. *Revised Statutes of the United States* (1878), 30.

³ *Slaughter-House Cases*, 1873. 16 Wallace, 36.

whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated. . . .

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government — a declaration designed to establish the freedom of four million of slaves — and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime

gives an idea of the class of servitude that is meant. The word "servitude" is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word "slavery" had been used. . . .

PART NINE. THE RECONSTRUCTION OF THE UNION

CHAPTER LV

PRESIDENTIAL RESTORATION

THE triumph of the Union armies settled, so far as might can settle a question of right, the vexing question of national *versus* state sovereignty. Secession had been tried and had failed. The doctrine of state sovereignty could no longer be upheld as a constitutional principle. But among the questions which the war did not and could not settle was the extent of the rights in the Union of the States which had rebelled. Avoiding the theoretical aspects of the problem, President Lincoln sought to effect a direct and simple restoration of the States upon the same principles which he had adopted at the beginning of the war. President Johnson continued the work of restoration on much the same theory.

168. *President Lincoln's Proclamation of Amnesty.*¹

Whereas . . .

Therefore, I, Abraham Lincoln, President of the United States, do proclaim, declare, and make known to all persons who have, directly or by implication, participated in the existing rebellion, except as hereinafter excepted, that a full pardon is hereby granted to them and each of them, with restoration of all rights of property, except as to slaves and in property cases where rights of third parties shall have intervened, and upon the condition that every such person shall take and subscribe an oath and thenceforward keep and maintain said oath inviolate, and which oath shall be registered for permanent preservation and shall be of the tenor and effect following, to wit:

I, — — —, do solemnly swear, in presence of Almighty God, that I will henceforth faithfully support, protect, and defend the Constitution of the United States, and the Union of the States

¹ December 8, 1863. Richardson, *Messages and Papers of the Presidents*, VI, 213-15.

thereunder; and that I will in like manner abide by and faithfully support all acts of Congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified, or held void by Congress or by decision of the Supreme Court; and that I will in like manner abide by and faithfully support all proclamations of the President during the existing rebellion having reference to slaves, so long and so far as not modified or declared void by decision of the Supreme Court. So help me God.

The persons excepted from the benefits of the foregoing provisions are all who are or shall have been civil or diplomatic officers or agents of the so-called Confederate Government; all who have left judicial stations under the United States to aid the rebellion; all who are or shall have been military or naval officers of said so-called Confederate Government above the rank of colonel in the army or of lieutenant in the navy; all who left seats in the United States Congress to aid the rebellion; all who resigned commissions in the Army or Navy of the United States and afterwards aided the rebellion; and all who have engaged in any way in treating colored persons, or white persons in charge of such, otherwise than lawfully as prisoners of war, and which persons may have been found in the United States service as soldiers, seamen, or in any other capacity.

And I do further proclaim, and make known that whenever, in any of the States of Arkansas, Texas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, Florida, South Carolina, and North Carolina, a number of persons, not less than one-tenth in number of the votes cast in such State at the Presidential election of the year A. D. 1860, each having taken the oath aforesaid, and not having since violated it, and being a qualified voter by the election law of the State existing immediately before the so-called act of secession, and excluding all others, shall reëstablish a State government which shall be republican and in nowise contravening said oath, such shall be recognized as the true government of the State, and the State shall receive thereunder the benefits of the constitutional provision which declares that "the United States shall guarantee to every State in this Union a republican form of government and shall pro-

tect each of them against invasion, and, on application of the legislature, or the executive (when the legislature can not be convened), against domestic violence."

And I do further proclaim, declare, and make known that any provision which may be adopted by such State government in relation to the freed people of such State which shall recognize and declare their permanent freedom, provide for their education, and which may yet be consistent as a temporary arrangement with their present condition as a laboring, landless, and homeless class, will not be objected to by the National Executive.

And it is suggested as not improper that in constructing a loyal State government in any State the name of the State, the boundary, the subdivisions, the constitution, and the general code of laws as before the rebellion be maintained, subject only to the modifications made necessary by the conditions hereinbefore stated, and such others, if any, not contravening said conditions and which may be deemed expedient by those framing the new State Government.

To avoid misunderstanding, it may be proper to say that this proclamation, so far as it relates to State governments, has no reference to States wherein loyal State governments have all the while been maintained. And for the same reason it may be proper to further say that whether members sent to Congress from any State shall be admitted to seats constitutionally rests exclusively with the respective Houses, and not to any extent with the Executive. And, still further, that this proclamation is intended to present the people of the States wherein the national authority has been suspended and loyal State governments have been subverted a mode in and by which the national authority and loyal State governments may be re-established within said States or in any of them; and while the mode presented is the best the Executive can suggest, with his present impressions, it must not be understood that no other possible mode would be acceptable. . . .

169. *Last Speech of President Lincoln.*¹

We all agree that the seceded States, so called, are out of their proper practical relation with the Union, and that the sole object of the Government, civil and military, in regard to those States is to again get them into that proper practical relation. I believe that it is not only possible, but in fact easier, to do this without deciding or even considering whether these States have ever been out of the Union, than with it. Finding themselves safely at home, it would be utterly immaterial whether they had ever been abroad. Let us all join in doing the acts necessary to restore the proper practical relations between these States and the Union, and each forever after innocently indulge his own opinion whether in doing the acts he brought the States from without into the Union, or only gave them proper assistance, they never having been out of it. . . .

170. *Appointment of a Provisional Governor for North Carolina.*²

Whereas the fourth section of the fourth article of the Constitution of the United States declares that the United States shall guarantee to every State in the Union a republican form of government and shall protect each of them against invasion and domestic violence; and

Whereas the President of the United States is by the Constitution made Commander in Chief of the Army and Navy, as well as chief civil executive officer of the United States, and is bound by solemn oath faithfully to execute the office of President of the United States and to take care that the laws be faithfully executed; and

Whereas the rebellion which has been waged by a portion of the people of the United States against the properly constituted authorities of the Government thereof in the most violent and revolting form, but whose organized and armed forces have now been almost entirely overcome, has in its revolutionary

¹ April 11, 1865. Nicholay and Hay, *Complete Works of Lincoln*, II, 672.

² May 29, 1865. Richardson, *Messages and Papers of the Presidents*, VI, 312-14.

progress deprived the people of the State of North Carolina of all civil government; and

Whereas it becomes necessary and proper to carry out and enforce the obligations of the United States to the people of North Carolina in securing them in the enjoyment of a republican form of government:

Now, therefore, in obedience to the high and solemn duties imposed upon me by the Constitution of the United States and for the purpose of enabling the loyal people of said State to organize a State government whereby justice may be established, domestic tranquillity insured, and loyal citizens protected in all their rights of life, liberty, and property, I, Andrew Johnson, President of the United States and Commander in Chief of the Army and Navy of the United States, do hereby appoint William W. Holden provisional governor of the State of North Carolina, whose duty it shall be, at the earliest practicable period, to prescribe such rules and regulations as may be necessary and proper for convening a convention composed of delegates to be chosen by that portion of the people of said State who are loyal to the United States, and no others, for the purpose of altering or amending the constitution thereof, and with authority to exercise within the limits of said State all the powers necessary and proper to enable such loyal people of the State of North Carolina to restore said State to its constitutional relations to the Federal Government and to present such a republican form of State government as will entitle the State to the guaranty of the United States therefor and its people to protection by the United States against invasion, insurrection, and domestic violence: Provided, That in any election that may hereafter be held for choosing delegates to any State convention as aforesaid no person shall be qualified as an elector or shall be eligible as a member of such convention unless he shall have previously taken and subscribed the oath of amnesty as set forth in the President's proclamation of May 29, A. D. 1865, and is a voter qualified as prescribed by the constitution and laws of the State of North Carolina in force immediately before the 20th day of May A. D. 1861, the date of the so-called

ordinance of secession; and the said convention, when convened, or the legislature that may be thereafter assembled, will prescribe the qualification of electors and the eligibility of persons to hold office under the constitution and laws of the State — a power the people of the several States composing the Federal Union have rightfully exercised from the origin of the Government to the present time.

And I do hereby direct —

First. That the military commander of the department and all officers and persons in the military and naval service aid and assist the said provisional governor in carrying into effect this proclamation; and they are enjoined to abstain from in any way hindering, impeding, or discouraging the loyal people from the organization of a State government as herein authorized.

Second. That the Secretary of State proceed to put in force all laws of the United States the administration whereof belongs to the State Department applicable to the geographical limits aforesaid.

Third. That the Secretary of the Treasury proceed to nominate for appointment assessors of taxes and collectors of customs and internal revenue and such other officers of the Treasury Department as are authorized by law and put in execution the revenue laws of the United States within the geographical limits aforesaid. In making appointments the preference shall be given to qualified loyal persons residing within the districts where their respective duties are to be performed; but if suitable residents of the district shall not be found, then persons residing in other States or districts shall be appointed.

Fourth. That the Postmaster-General proceed to establish post-offices and post routes and put into execution the postal laws of the United States within the said State, giving to loyal residents the preference of appointment; but if suitable residents are not found, then to appoint agents, etc., from other States.

Fifth. That the district judge for the judicial district in which North Carolina is included proceed to hold courts within said State in accordance with the provisions of the Act of Con-

gress. The Attorney-General will instruct the proper officers to libel and bring to judgment, confiscation, and sale property subject to confiscation and enforce the administration of justice within said State in all matters within the cognizance and jurisdiction of the Federal courts.

Sixth. That the Secretary of the Navy take possession of all public property belonging to the Navy Department within said geographical limits and put in operation all acts of Congress in relation to naval affairs having application to the said State.

Seventh. That the Secretary of the Interior put in force the laws relating to the Interior Department applicable to the geographical limits aforesaid. . . .

171. *First Annual Message of President Johnson.*¹

The Union of the United States of America was intended by its authors to last as long as the States themselves shall last. "The Union shall be perpetual" are the words of the Confederation. "To form a more perfect Union," by an ordinance of the people of the United States, is the declared purpose of the Constitution. . . .

The perpetuity of the Constitution brings with it the perpetuity of the States; their mutual relation makes us what we are, and in our political system their connection is indissoluble. The whole can not exist without the parts, nor the parts without the whole. So long as the Constitution of the United States endures, the States will endure. The destruction of the one is the destruction of the other; the preservation of the one is the preservation of the other.

I have thus explained my views of the mutual relations of the Constitution and the States, because they unfold the principles on which I have sought to solve the momentous questions and overcome the appalling difficulties that met me at the very commencement of my Administration. . . .

I found the States suffering from the effects of a civil war. Resistance to the General Government appeared to have ex-

¹ December 4, 1865. Richardson, *Messages and Papers of the Presidents*, VI, 353-58 *passim*.

hausted itself. The United States had recovered possession of their forts and arsenals, and their armies were in the occupation of every State which had attempted to secede. Whether the territory within the limits of those States should be held as conquered territory, under military authority emanating from the President as the head of the Army, was the first question that presented itself for decision.

Now military governments, established for an indefinite period, would have offered no security for the early suppression of discontent, would have divided the people into the vanquishers and the vanquished, and would have envenomed hatred rather than have restored affection. . . .

Besides, the policy of military rule over a conquered territory would have implied that the States whose inhabitants may have taken part in the rebellion had by the act of those inhabitants ceased to exist. But the true theory is that all pretended acts of secession were from the beginning null and void. The States can not commit treason nor screen the individual citizens who may have committed treason any more than they can make valid treaties or engage in lawful commerce with any foreign power. The States attempting to secede placed themselves in a condition where their vitality was impaired, but not extinguished; their functions suspended, but not destroyed.

But if any State neglects or refuses to perform its offices there is the more need that the General Government should maintain all its authority and as soon as practicable resume the exercise of all its functions. On this principle I have acted, and have gradually and quietly, and by almost imperceptible steps, sought to restore the rightful energy of the General Government and of the States. To that end provisional governors have been appointed for the States, conventions called, governors elected, legislatures assembled, and Senators and Representatives chosen to the Congress of the United States. At the same time the courts of the United States, as far as could be done, have been reopened, so that the laws of the United States may be enforced through their agency. The blockade has been removed and the custom-houses reestablished in the ports of

entry, so that the revenue of the United States may be collected. The Post-Office Department renews its ceaseless activity, and the General Government is thereby enabled to communicate promptly with its officers and agents. The courts bring security to persons and property; the opening of the ports invites the restoration of industry and commerce; the post-office renews the facilities of social intercourse and of business. . . .

I know very well that this policy is attended with some risk; that for its success it requires at least the acquiescence of the States which it concerns; that it implies an invitation to those States, by renewing their allegiance to the United States, to resume their functions as States of the Union. But it is a risk that must be taken. In the choice of difficulties it is the smallest risk; and to diminish and if possible to remove all danger, I have felt it incumbent on me to assert one other power of the General Government — the power of pardon. . . .

The next step which I have taken to restore the constitutional relations of the States has been an invitation to them to participate in the high office of amending the Constitution. . . .

It is not too much to ask, in the name of the whole people, that on the one side the plan of restoration shall proceed in conformity with a willingness to cast the disorders of the past into oblivion, and that on the other the evidence of sincerity in the future maintenance of the Union shall be put beyond any doubt by the ratification of the proposed amendment to the Constitution, which provides for the abolition of slavery forever within the limits of our country. . . .

The amendment to the Constitution being adopted, it would remain for the States whose powers have been so long in abeyance to resume their places in the two branches of the National Legislature, and thereby complete the work of restoration. Here it is for you, fellow-citizens of the Senate, and for you, fellow-citizens of the House of Representatives, to judge, each of you for yourselves, of the elections, returns, and qualifications of your own members. . . .

CHAPTER LVI

ORIGIN OF THE FOURTEENTH AMENDMENT

THE appointment of a joint committee of the House and Senate, to inquire into the condition of the States lately in rebellion and to report whether any of them was entitled to representation in Congress, was tantamount to a declaration that Congress would not recognize the state governments which had been restored by the President. The enactment of the so-called "black codes" by these Southern legislatures led Congress to frame two remedial measures — the Freedmen's Bureau Bill and the Civil Rights Bill. Both were vetoed; but the latter was passed over the veto. On the last day of April, 1866, the Joint Committee on Reconstruction laid before Congress a joint resolution proposing a fourteenth amendment to the Constitution. This was followed on June 18 by an elaborate report. The first section of the amendment as it passed the House was formulated by Bingham of Ohio: the first clause, defining citizenship, was added by the Senate. In view of the subsequent interpretation of this important section by the Supreme Court, the speeches of Bingham and of Howard, who championed the amendment in the Senate, are of much significance.

172. *Report of the Joint Committee on Reconstruction.*¹

Your committee came to the consideration of the subject referred to them with the most anxious desire to ascertain what was the condition of the people of the States recently in insurrection, and what, if anything, was necessary to be done before restoring them to the full enjoyment of all their original privileges. It was undeniable that the war into which they had plunged the country had materially changed their relations to the people of the loyal States. Slavery had been abolished by constitutional amendment. A large proportion of the population had become, instead of mere chattels, free men and citizens. Through all the past struggle these had remained true and loyal, and had, in large numbers, fought on the side of the Union. It was impossible to abandon them, without securing

¹ *Report of the Joint Committee on Reconstruction*, June 18, 1866, XIII-XXI *passim*.

them their rights as free men and citizens. The whole civilized world would have cried out against such base ingratitude, and the bare idea is offensive to all right-thinking men. Hence it became important to inquire what could be done to secure their rights, civil and political. It was evident to your committee that adequate security could only be found in appropriate constitutional provisions. By an original provision of the Constitution, representation is based on the whole number of free persons in each State, and three-fifths of all other persons. When all become free, representation for all necessarily follows. As a consequence the inevitable effect of the rebellion would be to increase the political power of the insurrectionary States, whenever they should be allowed to resume their positions as States of the Union. As representation is by the Constitution based upon population, your committee did not think it advisable to recommend a change of that basis. The increase of representation necessarily resulting from the abolition of slavery was considered the most important element in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative. It appeared to your committee that the rights of these persons by whom the basis of representation had been thus increased should be recognized by the general government. While slaves they were not considered as having any rights, civil or political. It did not seem just or proper that all the political advantages derived from their becoming free should be confined to their former masters, who had fought against the Union, and withheld from themselves, who had always been loyal. Slavery, by building up a ruling and dominant class, had produced a spirit of oligarchy adverse to republican institutions, which finally inaugurated civil war. The tendency of continuing the domination of such a class, by leaving it in the exclusive possession of political power, would be to encourage the same spirit, and lead to a similar result. Doubts were entertained whether Congress had power, even under the amended Constitution, to prescribe the qualifications of voters in a State, or could act directly on the subject. It was

doubtful, in the opinion of your committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached. As the best if not the only method of surmounting the difficulty, and as eminently just and proper in itself, your committee came to the conclusion that political power should be possessed in all the States exactly in proportion as the right of suffrage should be granted, without distinction of color or race. This it was thought would leave the whole question with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise. Such a provision would be in its nature gentle and persuasive, and would lead, it was hoped, at no distant day, to an equal participation of all, without distinction, in all the rights and privileges of citizenship, thus affording a full and adequate protection to all classes of citizens, since all would have, through the ballot-box, the power of self-protection. . . .

. . . The conclusion of your committee therefore is, that the so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic, shall place representation on an equitable basis, shall fix a stigma upon treason, and protect the loyal people against future claims for the expenses incurred in support of rebellion and for manumitted slaves, together with an express grant of power in Congress to enforce those provisions. To this end they offer a joint resolution for amending the Constitution of the United States, and the two several bills designed to carry the same into effect, before referred to. . . .

173. *Representative Bingham on the Joint Resolution.*¹

The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been

¹ *Congressional Globe*, 39 Cong., 1 Sess., 2542-43. May 10, 1866.

taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict — that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.

The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is one of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people. Why should any American citizen object to that? But, sir, it has been suggested, not here, but elsewhere, if this section does not confer suffrage the need of it is not perceived. To all such I beg leave again to say, that many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant vio-

lations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.

Sir, the words of the Constitution that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" include, among other privileges, the right to bear true allegiance to the Constitution and laws of the United States, and to be protected in life, liberty, and property. Next, sir, to the allegiance which we all owe to God our Creator, is the allegiance which we owe to our common country.

The time was in our history, thirty-three years ago, when, in the State of South Carolina, by solemn ordinance adopted in a convention held under the authority of State law, it was ordained, as a part of the fundamental law of that State, that the citizens of South Carolina, being citizens of the United States as well, should abjure their allegiance to every other government or authority than that of the State of South Carolina. . . .

There was also, as gentlemen know, an attempt made at the same time by that State to nullify the revenue laws of the United States. What was the legislation of Congress in that day to meet this usurpation of authority by that State, violative alike of the rights of the national Government and of the rights of the citizen?

. . . They provided a remedy by law for the invasion of the rights of the Federal Government and for the protection of its officials and those assisting them in executing the revenue laws. (See 4 Statutes-at-Large, 632-33.) No remedy was provided to protect the citizen. Why was the act to provide for the collection of the revenue passed, and to protect all acting under it, and no protection given to secure the citizen against punishment for fidelity to his country? But one answer can be given.

There was in the Constitution of the United States an express grant of power to the Federal Congress to lay and collect duties and imposts and to pass all laws necessary to carry that grant of power into execution. But, sir, that body of great and patriotic men looked in vain for any grant of power in the Constitution by which to give protection to the citizens of the United States resident in South Carolina against the infamous provision of the ordinance which required them to abjure the allegiance which they owed their country. It was an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent that it hath, no more; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land. . . .

174. *Senator Howard on the Joint Resolution.*¹

The first clause of this section relates to the privileges and immunities of citizens of the United States as such, and as distinguished from all other persons not citizens of the United States. It is not, perhaps, very easy to define with accuracy what is meant by the expression, "citizen of the United States," although that expression occurs twice in the Constitution, once in reference to the President of the United States, in which instance it is declared that none but a citizen of the United States shall be President, and again in reference to Senators, who are likewise to be citizens of the United States. Undoubtedly the expression is used in both those instances in the same sense in which it is employed in the amendment now before us. A citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws. Before the adoption of the Constitution of the United States, the citizens of each State were, in a quali-

¹ *Congressional Globe*, 39 Cong., 1 Sess., 2765-66. May 23, 1866.

fied sense at least, aliens to one another, for the reason that the several States before that event were regarded by each other as independent Governments, each one possessing a sufficiency of sovereign power to enable it to claim the right of naturalization; and, undoubtedly, each one of them possessed for itself the right of naturalizing foreigners, and each one, also, if it had seen fit so to exercise its sovereign power, might have declared the citizens of every other State to be aliens in reference to itself. With a view to prevent such confusion and disorder, and to put the citizens of the several States on an equality with each other as to all fundamental rights, a clause was introduced in the Constitution declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States. And how did they antecedently become citizens of the several States? By birth or by naturalization. They became such in virtue of national law, or rather of natural law which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country. Such persons were, therefore, citizens of the United States, as were born in the country or were made such by naturalization; and the Constitution declares that they are entitled, as citizens, to all the privileges and immunities of citizens in the several States. They are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their enforcement whenever they go within the limits of the several States of the Union. . . .

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of

the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with

the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. . . .

As I have already remarked, section one is a restriction upon the States, and does not, of itself, confer any power upon Congress. The power which Congress has, under this amendment, is derived, not from that section, but from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment. I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.

175. *The Fourteenth Amendment.*¹

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and

¹ This amendment went into effect July 28, 1868. *Revised Statutes of the United States* (1878), 31.

judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CHAPTER LVII

THEORIES AS TO THE STATUS OF THE STATES

As Congress put itself more directly into opposition to President Johnson, the leaders felt the need of a theory respecting the status of the Southern States which should serve as a sort of fulcrum in the approaching contest. At first the radical theories of Sumner and Stevens commended themselves to the average politician as little as the presidential theory. In the effort to find safe middle ground, the Joint Committee on Reconstruction formulated the forfeited-rights theory. In the case of *Texas v. White*, the Supreme Court practically adopted the congressional doctrine.

176. *The State-Suicide Theory of Charles Sumner.*¹

. . . It is true, beyond question, that the Acts of Secession are all inoperative and void against the Constitution of the United States. Though matured in successive conventions, sanctioned in various forms, and maintained ever since by bloody war, these acts — no matter by what name they may be called — are all equally impotent to withdraw an acre of territory or a single inhabitant from the rightful jurisdiction of the United States. But while thus impotent against the United States, it does not follow that they were equally impotent in the work of self-destruction. Clearly, the Rebels, by utmost efforts, could not impair the National jurisdiction; but it remains to be seen if their enmity did not act back with fatal rebound upon those very State Rights in behalf of which they commenced their treason. . . .

. . . On this important question I discard all theory, whether it be of State suicide or State forfeiture or State abdication, on the one side, or of State rights, immortal and unimpeachable, on the other side. . . . It is enough, that, for the time being, and *in the absence of a loyal government*, they can take no part and perform no function in the Union, *so that they cannot be recognized by the National Government*. The reason is

¹ *Atlantic Monthly*, October, 1863, XII, 518-26 *passim*.

plain. There are in these States no local functionaries bound by constitutional oaths, so that, in fact, there are no constitutional functionaries; and since the State government is necessarily composed of such functionaries, there can be no State government. . . . Therefore to all pretensions in behalf of State governments in the Rebel States I oppose the simple FACT, that for the time being no such governments exist. The broad spaces once occupied by those governments are now abandoned and vacated. . . .

. . . It is enough that the Rebel States be declared *vacated*, as *in fact* they are, by all local government which we are bound to recognize, so that the way is open to the exercise of a rightful jurisdiction.

And here the question occurs, How shall this rightful jurisdiction be established in the vacated States? Some there are, so impassioned for State rights, and so anxious for forms even at the expense of substance, that they insist upon the instant restoration of the old State governments in all their parts, through the agency of loyal citizens, who meanwhile must be protected in this work of restoration. But, assuming that all this is practicable, as it clearly is not, it attributes to the loyal citizens of a Rebel State, however few in numbers, — it may be an insignificant minority, — a power clearly inconsistent with the received principle of popular government, that the majority must rule. . . .

. . . The new governments can all be organized by Congress, which is the natural guardian of people without any immediate government, and within the jurisdiction of the Constitution of the United States. Indeed, with the State governments already *vacated* by rebellion, the Constitution becomes, for the time, the supreme and only law, binding alike on President and Congress, so that neither can establish any law or institution incompatible with it. And the whole Rebel region, deprived of all local government, lapses under the exclusive jurisdiction of Congress, precisely as any other territory; or, in other words, the lifting of the local governments leaves the whole vast region without any other govern-

ment than Congress, unless the President should undertake to govern it by military power. . . .

If we look at the origin of this power in Congress, we shall find that it comes from three distinct fountains, any one of which is ample to supply it. . . .

First. From the necessity of the case, *ex necessitate rei*, Congress must have jurisdiction over every portion of the United States *where there is no other government*; and since in the present case there is no other government, the whole region falls within the jurisdiction of Congress. This jurisdiction . . . can be questioned only in the name of the local government; but since this government has disappeared in the Rebel States, the jurisdiction of Congress is uninterrupted there. The whole broad Rebel region is *tabula rasa*, or "a clean slate," where Congress, under the Constitution of the United States, may write the laws. . . .

Secondly. This jurisdiction may also be derived from the *Rights of War*, which surely are not less abundant for Congress than for the President. . . . It is Congress that conquers; and the same authority that conquers must govern. . . .

Thirdly. But there is another source for this jurisdiction which is common alike to Congress and the President. It will be found in the constitutional provision, that "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion." . . .

. . . When a State fails to maintain a republican government *with officers sworn according to the requirements of the Constitution*, it ceases to be a constitutional State. The very case contemplated by the Constitution has arrived, and the National Government is invested with plenary powers, whether of peace or war. . . .

177. *The Conquered-Province Theory of Thaddeus Stevens.*¹

The President assumes, what no one doubts, that the late rebel States have lost their constitutional relations to the

¹ December 18, 1865. *Congressional Globe*, 39 Cong., 1 Sess., 72.

Union, and are incapable of representation in Congress, except by permission of the Government. It matters but little, with this admission, whether you call them States out of the Union, and now conquered territories, or assert that because the Constitution forbids them to do what they did do, that they are therefore only dead as to all national and political action, and will remain so until the Government shall breathe into them the breath of life anew and permit them to occupy their former position. In other words, that they are not out of the Union, but are only dead carcasses lying within the Union. In either case, it is very plain that it requires the action of Congress to enable them to form a State government and send representatives to Congress. Nobody, I believe, pretends that with their old constitutions and frames of government they can be permitted to claim their old rights under the Constitution. They have torn their constitutional States into atoms, and built on their foundations fabrics of a totally different character. Dead men cannot raise themselves. Dead States cannot restore their existence "as it was." Whose especial duty is it to do it? In whom does the Constitution place the power? Not in the judicial branch of Government, for it only adjudicates and does not prescribe laws. Not in the Executive, for he only executes and cannot make laws. Not in the Commander-in-Chief of the armies, for he can only hold them under military rule until the sovereign legislative power of the conqueror shall give them law. Unless the law of nations is a dead letter, the late war between two acknowledged belligerents severed their original compacts and broke all the ties that bound them together. The future condition of the conquered power depends on the will of the conqueror. They must come in as new states or remain as conquered provinces. Congress . . . is the only power that can act in the matter. . . .

178. *The Doctrine of Forfeited Rights.*¹

At the close of the rebellion, therefore, the people of the rebellious States were found, as the President expresses it, "deprived of all civil government."

Under this state of affairs it was plainly the duty of the President to enforce existing national laws, and to establish, as far as he could, such a system of government as might be provided for by existing national statutes. As commander-in-chief of a victorious army, it was his duty, under the law of nations and the army regulations, to restore order, to preserve property, and to protect the people against violence from any quarter until provision should be made by law for their government. He might, as President, assemble Congress and submit the whole matter to the law-making power; or he might continue military supervision and control until Congress should assemble on its regular appointed day. Selecting the latter alternative, he proceeded, by virtue of his power as commander-in-chief, to appoint provisional governors over the revolted States. . . . But it was not for him to decide upon the nature or effect of any system of government which the people of these States might see fit to adopt. This power is lodged by the Constitution in the Congress of the United States, that branch of the government in which is vested the authority to fix the political relations of the States to the Union, whose duty it is to guarantee to each State a republican form of government, and to protect each and all of them against foreign or domestic violence, and against each other. We cannot, therefore, regard the various acts of the President in relation to the formation of local governments in the insurrectionary States, and the conditions imposed by him upon their action, in any other light than as intimations to the people that, as commander-in-chief of the army, he would consent to withdraw military rule just in proportion as they should, by their acts, manifest a disposition to preserve order among themselves,

¹ *Report of the Joint Committee on Reconstruction*, June 18, 1866, VIII-XII *passim*.

establish governments denoting loyalty to the Union, and exhibit a settled determination to return to their allegiance, leaving with the law-making power to fix the terms of their final restoration to all their rights and privileges as States of the Union. . . .

A claim for the immediate admission of senators and representatives from the so-called Confederate States has been urged, which seems to your committee not to be founded either in reason or in law, and which cannot be passed without comment. Stated in a few words, it amounts to this: That inasmuch as the lately insurgent States had no legal right to separate themselves from the Union, they still retain their positions as States, and consequently the people thereof have a right to immediate representation in Congress without the imposition of any conditions whatever; and further, that until such admission Congress has no right to tax them for the support of the government. It has even been contended that until such admission all legislation affecting their interests is, if not unconstitutional, at least unjustifiable and oppressive.

It is believed by your committee that all these propositions are not only wholly untenable, but, if admitted, would tend to the destruction of the government.

It must not be forgotten that the people of these States, without justification or excuse, rose in insurrection against the United States. They deliberately abolished their State governments so far as the same connected them politically with the Union as members thereof under the Constitution. They deliberately renounced their allegiance to the federal government, and proceeded to establish an independent government for themselves. . . .

Whether legally and constitutionally or not, they did, in fact, withdraw from the Union and made themselves subjects of another government of their own creation. And they only yielded when, after a long, bloody, and wasting war, they were compelled by utter exhaustion to lay down their arms; and this they did, not willingly, but declaring that they yielded because they could no longer resist, affording no evidence whatever of

repentance for their crime, and expressing no regret, except that they had no longer the power to continue the desperate struggle.

It cannot, we think, be denied by any one, having a tolerable acquaintance with public law, that the war thus waged was a civil war of the greatest magnitude. The people waging it were necessarily subject to all the rules which, by the law of nations, control a contest of that character, and to all the legitimate consequences following it. One of those consequences was that, within the limits prescribed by humanity, the conquered rebels were at the mercy of the conquerors. . . .

Your committee do not deem it either necessary or proper to discuss the question whether the late Confederate States are still States of this Union, or can ever be otherwise. Granting this profitless abstraction about which so many words have been wasted, it by no means follows that the people of those States may not place themselves in a condition to abrogate the powers and privileges incident to a State of the Union, and deprive themselves of all pretence of right to exercise those powers and enjoy those privileges. A State within the Union has obligations to discharge as a member of the Union. It must submit to federal laws and uphold federal authority. It must have a government republican in form, under and by which it is connected with the general government, and through which it can discharge its obligations. It is more than idle, it is mockery, to contend that a people who have thrown off their allegiance, destroyed the local government which bound their States to the Union as members thereof, defied its authority, refused to execute its laws, and abrogated every provision which gave them political rights within the Union, still retain, through all, the perfect and entire right to resume, at their own will and pleasure, all their privileges within the Union, and especially to participate in its government, and to control the conduct of its affairs. To admit such a principle for one moment would be to declare that treason is always master and loyalty a blunder. Such a principle is void by its very nature and essence, because inconsistent with the theory of government, and fatal to its very existence.

On the contrary, we assert that no portion of the people of this country, whether in State or Territory, have the right, while remaining on its soil, to withdraw from or reject the authority of the United States. They must obey its laws as paramount, and acknowledge its jurisdiction. They have no right to secede; and while they can destroy their State governments, and place themselves beyond the pale of the Union, so far as the exercise of State privileges is concerned, they cannot escape the obligations imposed upon them by the Constitution, and the laws, nor impair the exercise of national authority. The Constitution, it will be observed, does not act upon States, as such, but upon the people; while, therefore, the people cannot escape its authority, the States may, through the act of their people, cease to exist in an organized form, and thus dissolve their political relations with the United States. . . .

179. *The Supreme Court on the Status of the States.*¹

. . . A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. . . .

In all respects, so far as the objects could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them. . . .

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles,

¹ *Texas v. White*, 1868. 7 Wallace, 700.

similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. . . .

. . . Not only therefore can there be no loss of separate and independent autonomy to the States, through their union and under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States. . . .

Considered therefore as transacted under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. . . .

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of

obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion. . . .

CHAPTER LVIII

CONGRESSIONAL RECONSTRUCTION

THE policy of the radical leaders who dominated Congress after the elections of 1866 has been well characterized as "thorough." Their purposes were to assert effectively the control of Congress over the President, and, disregarding the governments which he had recognized, to reorganize the Southern States on the basis of negro suffrage. The first object was attained by the Tenure of Office Act and by the provision in the Appropriation Act which forbade the President to issue military orders except through the general of the army. The other purpose was accomplished by the three Reconstruction Acts of March 2, March 23, and July 17. All were passed over the President's veto. The broad constitutional grounds upon which the President based his opposition are stated in the following passages from his messages.

180. *Veto Message of March 2, 1867.*¹

The bill places all the people of the ten States therein named under the absolute domination of military rulers; and the preamble undertakes to give the reason upon which the measure is based and the ground upon which it is justified. It declares that there exists in those States no legal governments and no adequate protection for life or property, and asserts the necessity of enforcing peace and good order within their limits. . . .

The bill, however, would seem to show upon its face that the establishment of peace and good order is not its real object. The fifth section declares that the preceding sections shall cease to operate in any State where certain events shall have happened. These events are, first, the selection of delegates to a State convention by an election at which negroes shall be allowed to vote; second, the formation of a State constitution by the convention so chosen; third, the insertion into the State constitution of a provision which will secure the right of voting at all elections to negroes and to such white men as may not

¹ Richardson, *Messages and Papers of the Presidents*, VI, 498-507 *passim*.

be disfranchised for rebellion or felony; fourth, the submission of the constitution for ratification to negroes and white men not disfranchised, and its actual ratification by their vote; fifth, the submission of the State constitution to Congress for examination and approval, and the actual approval of it by that body; sixth, the adoption of a certain amendment to the Federal Constitution by a vote of the legislature elected under the new constitution; seventh, the adoption of said amendment by a sufficient number of other States to make it a part of the Constitution of the United States. All these conditions must be fulfilled before the people of any of these States can be relieved from the bondage of military domination; but when they are fulfilled, then immediately the pains and penalties of the bill are to cease, no matter whether there be peace and order or not, and without any reference to the security of life or property. The excuse given for the bill in the preamble is admitted by the bill itself not to be real. The military rule which it establishes is plainly to be used, not for any purpose of order or for the prevention of crime, but solely as a means of coercing the people into the adoption of principles and measures to which it is known that they are opposed, and upon which they have an undeniable right to exercise their own judgment. . . .

. . . Have we the power to establish and carry into execution a measure like this? I answer, Certainly not, if we derive our authority from the Constitution and if we are bound by the limitations which it imposes.

This proposition is perfectly clear, that no branch of the Federal Government — executive, legislative, or judicial — can have any just powers except those which it derives through and exercises under the organic law of the Union. Outside of the Constitution we have no legal authority more than private citizens, and within it we have only so much as that instrument gives us. This broad principle limits all our functions and applies to all subjects. It protects not only the citizens of States which are within the Union, but it shields every human being who comes or is brought under our jurisdiction. We have no

right to do in one place more than in another that which the Constitution says we shall not do at all. If, therefore, the Southern States were in truth out of the Union, we could not treat their people in a way which the fundamental law forbids.

Some persons assume that the success of our arms in crushing the opposition which was made in some of the States to the execution of the Federal laws reduced those States and all their people — the innocent as well as the guilty — to the condition of vassalage and gave us a power over them which the Constitution does not bestow or define or limit. No fallacy can be more transparent than this. Our victories subjected the insurgents to legal obedience, not to the yoke of an arbitrary despotism. When an absolute sovereign reduces his rebellious subjects, he may deal with them according to his pleasure, because he had that power before. But when a limited monarch puts down an insurrection, he must still govern according to law. . . .

This is a bill passed by Congress in time of peace. There is not in any one of the States brought under its operation either war or insurrection. The laws of the States and of the Federal Government are all in undisturbed and harmonious operation. The courts, State and Federal, are open and in the full exercise of their proper authority. Over every State comprised in these five military districts, life, liberty, and property are secured by State laws and Federal laws, and the National Constitution is everywhere in force and everywhere obeyed. What, then, is the ground on which this bill proceeds? The title of the bill announces that it is intended "for the more efficient government" of these ten States. It is recited by way of preamble that no legal State governments "nor adequate protection for life or property" exist in those States, and that peace and good order should be thus enforced. The first thing which arrests attention upon these recitals, which prepare the way for martial law, is this, that the only foundation upon which martial law can exist under our form of government is not stated or so much as pretended. Actual war, foreign invasion, domestic insurrection — none of these appear; and none of

these, in fact, exist. It is not even recited that any sort of war or insurrection is threatened. Let us pause here to consider, upon this question of constitutional law and the power of Congress, a recent decision of the Supreme Court of the United States in *ex parte* Milligan. . . .

The purpose and object of the bill — the general intent which pervades it from beginning to end — is to change the entire structure and character of the State governments and to compel them by force to the adoption of organic laws and regulations which they are unwilling to accept if left to themselves. The negroes have not asked for the privilege of voting; the vast majority of them have no idea what it means. This bill not only thrusts it into their hands, but compels them, as well as the whites, to use it in a particular way. If they do not form a constitution with prescribed articles in it and afterwards elect a legislature which will act upon certain measures in a prescribed way, neither blacks nor whites can be relieved from the slavery which the bill imposes upon them. Without pausing here to consider the policy or impolicy of Africanizing the southern part of our territory, I would simply ask the attention of Congress to that manifest, well-known, and universally acknowledged rule of constitutional law which declares that the Federal Government has no jurisdiction, authority, or power to regulate such subjects for any State. To force the right of suffrage out of the hands of the white people and into the hands of the negroes is an arbitrary violation of this principle. . . .

181. *Veto Message of March 23, 1867.*¹

This bill provides for elections in the ten States brought under the operation of the original act to which it is supplementary. Its details are principally directed to the elections for the formation of the State constitutions, but by the sixth section of the bill "all elections" in these States occurring while the original act remains in force are brought within its purview. . . .

. . . No consideration could induce me to give my approval

¹ Richardson, *Messages and Papers of the Presidents*, VI, 531-34 *passim*.

to such an election law for any purpose, and especially for the great purpose of framing the constitution of a State. If ever the American citizen should be left to the free exercise of his own judgment it is when he is engaged in the work of forming the fundamental law under which he is to live. That work is his work, and it can not properly be taken out of his hands. All this legislation proceeds upon the contrary assumption that the people of each of these States shall have no constitution except such as may be arbitrarily dictated by Congress and formed under the restraint of military rule. A plain statement of facts makes this evident.

In all these States there are existing constitutions, framed in the accustomed way by the people. Congress, however, declares that these constitutions are not "loyal and republican," and requires the people to form them anew. What, then, in the opinion of Congress, is necessary to make the constitution of a State "loyal and republican"? The original act answers the question: It is universal negro suffrage — a question which the Federal Constitution leaves exclusively to the States themselves. All this legislative machinery of martial law, military coercion, and political disfranchisement is avowedly for that purpose and none other. The existing constitutions of the ten States conform to the acknowledged standards of loyalty and republicanism. Indeed, if there are degrees in republican forms of government, their constitutions are more republican now than when these States, four of which were members of the original thirteen, first became members of the Union.

Congress does not now demand that a single provision of their constitution be changed except such as confine suffrage to the white population. It is apparent, therefore, that these provisions do not conform to the standard of republicanism which Congress seeks to establish. That there may be no mistake, it is only necessary that reference should be made to the original act, which declares "such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates." What class of persons is here meant clearly appears in the same sec-

tion; that is to say, "the male citizens of said State 21 years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election."

Without these provisions no constitution which can be framed in any one of the ten States will be of any avail with Congress. This, then, is the test of what the constitution of a State of this Union must contain to make it republican. Measured by such a standard, how few of the States now composing the Union have republican constitutions! If in the exercise of the constitutional guaranty that Congress shall secure to every State a republican form of government universal suffrage for blacks as well as whites is a *sine qua non*, the work of reconstruction may as well begin in Ohio as in Virginia, in Pennsylvania as in North Carolina. . . .

182. *Veto Message of July 19, 1867.*¹

The veto of the original bill of the 2d of March was based on two distinct grounds — the interference of Congress in matters strictly appertaining to the reserved powers of the States and the establishment of military tribunals for the trial of citizens in time of peace. The impartial reader of that message will understand that all that it contains with respect to military despotism and martial law has reference especially to the fearful power conferred on the district commanders to displace the criminal courts and assume jurisdiction to try and to punish by military boards; that, potentially, the suspension of the *habeas corpus* was martial law and military despotism. The act now before me not only declares that the intent was to confer such military authority, but also to confer unlimited military authority over all the other courts of the State and over all the officers of the State — legislative, executive, and judicial. Not content with the general grant of power, Congress, in the second section of this bill, specifically gives to each military commander the power "to suspend or remove from office, or from the performance of official duties and the exercise of official

¹ Richardson, *Messages and Papers of the Presidents*, VI, 537-44 *passim*.

powers, any officer or person holding or exercising, or professing to hold or exercise, any civil or military office or duty in such district under any power, election, appointment, or authority derived from, or granted by, or claimed under any so-called State, or the government thereof, or any municipal or other division thereof."

A power that hitherto all the departments of the Federal Government, acting in concert or separately, have not dared to exercise is here attempted to be conferred on a subordinate military officer. To him, as a military officer of the Federal Government, is given the power, supported by "a sufficient military force," to remove every civil officer of the State. What next? The district commander, who has thus displaced the civil officer, is authorized to fill the vacancy by the detail of an officer or soldier of the Army, or by the appointment of "some other person." . . .

The clear intent of this section is that the officer or soldier detailed to fill a civil office must execute its duties according to the laws of the State. . . .

A singular contradiction is apparent here. Congress declares these local State governments to be illegal governments, and then provides that these illegal governments shall be carried on by Federal officers, who are to perform the very duties imposed on its own officers by this illegal State authority. It certainly would be a novel spectacle if Congress should attempt to carry on a *legal* State government by the agency of its own officers. It is yet more strange that Congress attempts to sustain and carry on an *illegal* State government by the same Federal agency. . . .

This bill and the acts to which it is supplementary are all founded upon the assumption that these ten communities are not States and that their existing governments are not legal. Throughout the legislation upon this subject they are called "rebel States," and in this particular bill they are denominated "so-called States," and the vice of illegality is declared to pervade all of them. The obligations of consistency bind a legislative body as well as the individuals who compose it. It

is now too late to say that these ten political communities are not States of the Union. Declarations to the contrary made in these three acts are contradicted again and again by repeated acts of legislation enacted by Congress from the year 1861 to the year 1867.

During that period, while these States were in actual rebellion, and after that rebellion was brought to a close, they have been again and again recognized as States of the Union. Representation has been apportioned to them as States. They have been divided into judicial districts for the holding of district and circuit courts of the United States, as States of the Union only can be districted. The last act on this subject was passed July 23, 1866, by which every one of these ten States was arranged into districts and circuits.

They have been called upon by Congress to act through their legislatures upon at least two amendments to the Constitution of the United States. As States they have ratified one amendment, which required the vote of twenty-seven States of the thirty-six then composing the Union. When the requisite twenty-seven votes were given in favor of that amendment — seven of which votes were given by seven of these ten States — it was proclaimed to be a part of the Constitution of the United States, and slavery was declared no longer to exist within the United States or any place subject to their jurisdiction. If these seven States were not legal States of the Union, it follows as an inevitable consequence that in some of the States slavery yet exists. It does not exist in these seven States, for they have abolished it also in their State constitutions; but Kentucky not having done so, it would still remain in that State. But, in truth, if this assumption that these States have no legal State governments be true, then the abolition of slavery by these illegal governments binds no one, for Congress now denies to these States the power to abolish slavery by denying to them the power to elect a legal State legislature, or to frame a constitution for any purpose, even for such a purpose as the abolition of slavery. . . .

So much for continuous legislative recognition. The in-

stances cited, however, fall far short of all that might be enumerated. Executive recognition, as is well known, has been frequent and unwavering. The same may be said as to judicial recognition through the Supreme Court of the United States. That august tribunal, from first to last, in the administration of its duties *in banc* and upon the circuit, has never failed to recognize these ten communities as legal States of the Union. . . .

Within a period less than a year the legislation of Congress has attempted to strip the executive department of the Government of some of its essential powers. The Constitution and the oath provided in it devolve upon the President the power and duty to see that the laws are faithfully executed. The Constitution, in order to carry out this power, gives him the choice of the agents, and makes them subject to his control and supervision. But in the execution of these laws the constitutional obligation upon the President remains, but the power to exercise that constitutional duty is effectually taken away. The military commander is as to the power of appointment made to take the place of the President, and the General of the Army the place of the Senate; and any attempt on the part of the President to assert his own constitutional power may, under pretense of law, be met by official insubordination. It is to be feared that these military officers, looking to the authority given by these laws rather than to the letter of the Constitution, will recognize no authority but the commander of the district and the General of the Army.

If there were no other objection than this to this proposed legislation, it would be sufficient. Whilst I hold the chief executive authority of the United States, whilst the obligation rests upon me to see that all the laws are faithfully executed, I can never willingly surrender that trust or the powers given for its execution. . . .

CHAPTER LIX

THE SUPREME COURT AND RECONSTRUCTION

DURING actual reconstruction, the Supreme Court showed great reluctance to take sides in the political controversy. It was even accused of welcoming technicalities to avoid passing upon the constitutionality of congressional reconstruction. In the case of *Mississippi v. Johnson*, the Court refused to express an opinion on the work of the radicals, confining itself strictly to the question whether it could restrain the President by injunction from carrying out any act of Congress. In the case of *Texas v. White*, decided in 1868, the Supreme Court took a more positive attitude toward the issues which had convulsed the country. While the Court did not pronounce directly upon the constitutionality of the Reconstruction Acts, it did in general justify the course of congressional action. Extracts from the first part of the decision have already been given [No. 179].

183. *State of Mississippi v. Andrew Johnson, President.*¹

The Chief Justice delivered the opinion of the Court:

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court to perpetually enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named.

The acts referred to are those of March 2d, and March 23d, 1867, commonly known as the Reconstruction Acts.

The Attorney-General objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues

¹ Supreme Court of the United States, 1867. 4 Wallace, 475.

discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. . . .

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary acts, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are

unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress [the courts?] can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us. . . .

184. *State of Texas v. White*.¹

The Chief Justice delivered the opinion of the Court:

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from

¹ Supreme Court of the United States, 1868. 7 Wallace, 700.

the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. . . .

The new freemen necessarily became part of the people, and the people still constituted the State; for States like individuals retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guarantee. . . .

But the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress. "Under the fourth article of the constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not." . . .

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in Decem-

ber, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the constitution, and in the acts known as the Reconstruction Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the act of March 2, 1867, the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist. . . .

CHAPTER LX

THE IMPEACHMENT OF PRESIDENT JOHNSON

THE struggle between the President and Congress culminated in the adoption of articles of impeachment by the House. The real significance of the trial, obscured by the technical subtleties of the managers for the House and by the lengthy arguments of the counsel for the defense, appears most clearly in the opinions rendered by individual Senators. The essential points at issue are stated temperately by Senator Grimes. Senators Wilson and Fessenden represent opposing views of the nature of impeachable offenses.

185. *Opinion of Senator Wilson.*¹

High misdemeanors may or may not be violations of the laws. High misdemeanors may, in my judgment, be misbehavior in office detrimental to the interests of the nation, dangerous to the rights of the people, or dishonoring to the government. I entertain the conviction that the framers of the Constitution intended to impose the high duty upon the House of Representatives to arraign the Chief Magistrate for such misbehavior in office as injured, dishonored, or endangered the nation, and to impose upon the Senate the duty of trying, convicting, and removing the Chief Magistrate proved guilty of such misbehavior. Believing this to be the intention of the framers of the Constitution and its true meaning; believing that the power should be exercised whenever the security of the country and the liberties of the people imperatively demand it; and believing by the evidence adduced to prove the charges of violating the Constitution and the tenure-of-office act, and by the confessed and justified acts of the President, that he is guilty of high misdemeanors, I unhesitatingly vote for his conviction and removal from his high office.

The President is charged by the House of Representatives with violating the Constitution and the tenure-of-office act in removing Mr. Stanton from the office of Secretary of War,

¹ *Trial of Andrew Johnson*, III, 215-16.

and in appointing Adjutant General Thomas Secretary of War *ad interim*. The removal of Mr. Stanton and the appointment of Adjutant General Thomas, and the violation of the tenure-of-office act, if Mr. Stanton be within that act, stand confessed and justified in the answer of the President to the charges of the House of Representatives. The answer of the President, without any other evidence, is to my mind conclusive evidence of his guilt. Upon his answer, confessions, assumptions, and justifications I have no hesitation in recording my vote of "guilty." The assumptions of power put forth by the President in his defence cannot but startle and alarm all men who would maintain the just powers of all branches of the government. Had the President inadvertently violated the Constitution and the laws; had he pleaded in justification misconstruction of the Constitution and the laws, I might have hesitated to vote for his conviction. But he claims the right to remove civil officers and appoint others, *ad interim*, during the session of the Senate. If that claim of power is admitted by a vote of acquittal, the President can remove during the session of the Senate tens of thousands of civil officers with their millions of compensation, and appoint his own creatures to fill their places without the advice and consent of the Senate, and thus nullify that provision of the Constitution that empowers the Senate to give its advice and consent to appointments.

Not content with this assumption of power, the President claims the right to pronounce a law of Congress unconstitutional, to refuse to execute it, although he is sworn to do so, and to openly violate it with a view of testing its constitutionality in the courts, although no means may exist for months or years to come, to test the constitutionality of the law so violated in the judicial tribunals of the country. The President claims and has exercised the right to declare Congress an unconstitutional body, incapable of enacting laws or of proposing amendments to the Constitution; to hold the laws in abeyance; to refuse to execute them, and to defiantly violate them in order to test their constitutionality. These are the positions assumed by Andrew Johnson. These assumptions, if admitted,

radically change the character of our government. If they are sustained by a verdict of acquittal, the President ceases to be the servant of the law, and becomes the master of the people; and a law-non-executing power, a law-defying power, a law-breaking power is created within the government. Instead of an executive bound to the faithful execution of the laws of Congress, the nation has an executive bound only to execute the laws according to his own caprices, whims, and sovereign pleasure. Never can I assent, by a vote of acquittal, to executive assumptions so unconstitutional, so subversive of the government, so revolutionary in their scope and tendency. These assumptions will introduce into our constitutional system, into our government of nicely adjusted parts, derangement, disorganization, and anarchy. . . .

186. *Opinion of Senator Fessenden.*¹

The power of impeachment is conferred by the Constitution in terms so general as to occasion great diversity of opinion with regard to the nature of offences which may be held to constitute crimes or misdemeanors within its intent and meaning. Some contend, and with great force of argument, both upon principle and authority, that only such crimes and misdemeanors are intended as are subject to indictment and punishment as a violation of some known law. Others contend that anything is a crime or misdemeanor within the meaning of the Constitution which the appointed judges choose to consider so; and they argue that the provision was left indefinite from the necessity of the case, as offences of public officers, injurious to the public interest, and for which the offender ought to be removed, cannot be accurately defined beforehand; that the remedy provided by impeachment is of a political character, and designed for the protection of the public against unfaithful and corrupt officials. Granting, for the sake of the argument, that this latter construction is the true one, it must be conceded that the power thus conferred might be liable to very great abuse, especially in times of high party excitement, when the

¹ *Trial of Andrew Johnson*, III, 29-30.

passions of the people are inflamed against a perverse and obnoxious public officer. If so it is a power to be exercised with extreme caution, when you once get beyond the line of specific criminal offences. The tenure of public offices, except those of judges, is so limited in this country, and the ability to change them by popular suffrage so great, that it would seem hardly worth while to resort to so harsh a remedy, except in extreme cases, and then only upon clear and unquestionable grounds. In the case of an elective Chief Magistrate of a great and powerful people, living under a written Constitution, there is much more at stake in such a proceeding than the fate of the individual. The office of President is one of the great coördinate branches of the government, having its defined powers, privileges, and duties; as essential to the very framework of the government as any other, and to be touched with as careful a hand. Anything which conduces to weaken its hold upon the respect of the people, to break down the barriers which surround it, to make it the mere sport of temporary majorities, tends to the great injury of our government, and inflicts a wound upon constitutional liberty. It is evident, then, as it seems to me, that the offence for which a Chief Magistrate is removed from office, and the power intrusted to him by the people transferred to other hands, and especially where the hands which receive it are to be the same which take it from him, should be of such a character as to commend itself at once to the minds of all right thinking men as, beyond all question, an adequate cause. It should be free from the taint of party; leave no reasonable ground of suspicion upon the motives of those who inflict the penalty, and address itself to the country and the civilized world as a measure justly called for by the gravity of the crime, and the necessity of its punishment. Anything less than this, especially where the offence is one not defined by any law, would, in my judgment, not be justified by a calm and considerate public opinion as a cause for removal of a President of the United States. And its inevitable tendency would be to shake the faith of the friends of constitutional liberty in the permanency of our free institutions, and the capacity of man for self-government. . . .

187. *Opinion of Senator Grimes.*¹

The first question presented is, is Mr. Stanton's case within the provisions of the tenure-of-office act of March 2, 1867?

Certainly it is not within the body of the first section. . . .

The plain intent of the proviso to the first section is to prescribe a tenure for the office of Secretary different from the tenure fixed for other civil officers. This is known to have been done on account of the marked difference between the heads of departments and all other officers, which made it desirable and necessary for the public service that the heads of departments should go out of office with the President by whom they were appointed. It would, indeed, be a strange result of the law if those Secretaries appointed by Mr. Lincoln should hold by the tenure fixed by the act for ordinary civil officers, while all the other Secretaries should hold by a different tenure; that those appointed by the present and all future Presidents should hold only during the term of the President by whom they may have been appointed, while those not appointed by him should hold indefinitely; and this under a law which undertakes to define the tenure of all the Secretaries who are to hold their offices under the law. I cannot come to that conclusion. My opinion is, that if Mr. Stanton's tenure of office is prescribed by this law at all, it is prescribed to him as Secretary of War, under and by force of the proviso to the first section; and if his case is not included in that proviso it is not included in the law at all.

It is clear to my mind that the proviso does not include, and was not intended to include, Mr. Stanton's case. It is not possible to apply to his case the language of the proviso unless we suppose it to have been intended to legislate him out of office; a conclusion, I consider, wholly inadmissible. He was appointed by President Lincoln during his first term of office. He cannot hereafter go out of office at the end of the term of the President by whom he was appointed. That term was ended before the law was passed. The proviso, therefore,

¹ *Trial of Andrew Johnson*, III, 331-38 *passim*.

cannot have been intended to make a rule for his case; and it is shown that it was not intended. This was plainly declared in debate by the conference committee, both in the Senate and in the House of Representatives, when the proviso was introduced and its effect explained. The meaning and effect of the proviso were then explained and understood to be that the only tenure of the Secretaries provided for by this law was a tenure to end with the term of service of the President by whom they were appointed, and as this new tenure could not include Mr. Stanton's case, it was here explicitly declared that it did not include it. . . .

I come now to the question of intent. Admitting that the President had no power under the law to issue the order to remove Mr. Stanton and appoint General Thomas Secretary for the Department of War *ad interim*, did he issue those orders with a manifest *intent* to violate the laws and "the Constitution of the United States," as charged in the articles, or did he issue them, as he says he did, with a view to have the constitutionality of the tenure-of-office act judicially decided?

It is apparent to my mind that the President thoroughly believed the tenure-of-office act to be unconstitutional and void. He was so advised by every member of his cabinet when the bill was presented to him for his approval in February, 1867. The managers on the part of the House of Representatives have put before us and made legal evidence in this case the message of the President to the Senate, dated December 12, 1867. In that message the President declared —

That tenure-of-office law did not pass without notice. Like other acts it was sent to the President for approval. As is my custom, I submitted its consideration to my cabinet for their advice upon the question, whether I should approve it or not. It was a grave question of constitutional law, in which I would of course rely most upon the opinion of the Attorney General and of Mr. Stanton, who had once been Attorney General. Every member of my cabinet advised me that the proposed law was unconstitutional. All spoke without doubt or reservation, but Mr. Stanton's condemnation of the law was the most elaborate and emphatic. He referred to the

constitutional provisions, the debates in Congress — especially to the speech of Mr. Buchanan when a senator — to the decisions of the Supreme Court, and to the usage from the beginning of the government through every successive administration, all concurring to establish the right of removal as vested by the Constitution in the President. To all these he added the weight of his own deliberate judgment, and advised me that it was my duty to defend the power of the President from usurpation and to veto the law. . . .

Here, then, we have the President advised by all of the members of his cabinet, including the Attorney General, whose duty it is made by law to give legal advice to him, including the Secretary for the Department of War, also an eminent lawyer and an Attorney General of the United States under a former administration, that the act of March 2, 1867, was unconstitutional and void, that the three members of the cabinet holding over from Mr. Lincoln's administration were not included within its provisions, and that it was desirable that upon some proper case a judicial determination on the constitutionality of the law should be obtained.

Now, when it is remembered that, according to Chief Justice Marshall, the act of 1789, creating the Department of War, was intentionally framed "so as to clearly imply the power of removal to be solely in the President," and that "as the bill passed into a law, it has ever been considered as a full expression of the sense of the legislature on this important part of the American Constitution;" when it is remembered that this construction has been acquiesced in and acted on by every President from Washington to Johnson, by the Supreme Court, by every Congress of the United States from the first that ever assembled under the Constitution down to the 39th; and when it is remembered that all of the President's cabinet and the most eminent counsellors within his reach advised him that the preceding Congresses, the past Presidents and statesmen, and Story and Kent and Thompson and Marshall were right in their construction of the Constitution, and the 39th Congress wrong, is it strange that he should doubt or dispute the constitutionality of the tenure-of-office act?

But all this is aside from the question whether Mr. Stanton's case is included in the provisions of that act. If it was not, as I think it clearly was not, then the question of intent is not in issue, for he did no unlawful act. If it was included, then I ask whether, in view of those facts, the President's *guilty intent* to do an unlawful act "shines with such a clear and certain light" as to justify, to require us to pronounce him guilty of a high constitutional crime or misdemeanor? . . .

It is not denied, I think, that the constitutional validity of this law could not be tested before the courts unless a case was made and presented to them. No such case could be made unless the President made a removal. That act of his would necessarily be the basis on which the case would rest. He is sworn to "preserve, protect, and defend the Constitution of the United States." He must *defend* it against all encroachments from whatever quarter. A question arose between the legislative and executive departments as to their relative powers in the matter of removals and appointments to office. That question was, Does the Constitution confer on the President the power which the tenure-of-office act seeks to take away? It was a question manifestly of construction and interpretation. The Constitution has provided a common arbiter in such cases of controversy — the Supreme Court of the United States. Before that tribunal can take jurisdiction a removal must be made. The President attempted to give the court jurisdiction in that way. For doing so he is impeached, and for the reason, as the managers say, that —

He has no authority under the Constitution, or by any law, to enter into any schemes or plans for the purpose of testing the validity of the laws of the country, either judicially or otherwise.

If this be true, then if the two houses of Congress should pass by a two-thirds vote over the President's veto an act depriving the President of the right to exercise the pardoning power, and he should exercise that power nevertheless, or if he should exercise it only in a single case for the purpose of testing the constitutionality of the law, he would be guilty of

a high crime and misdemeanor and impeachable accordingly. The managers' theory establishes at once the complete supremacy of Congress over the other branches of government. I can give my assent to no such doctrine.

This was a *punitive* statute. It was directed against the President alone. It interfered with the prerogatives of his department as recognized from the foundation of the government. It wrested from him powers which, according to the legislative and judicial construction of 80 years, had been bestowed upon him by the Constitution itself. In my opinion it was not only proper, but it was his duty to cause the disputed question to be determined in the manner and by the tribunal established for such purposes. This government can only be preserved and the liberty of the people maintained by preserving intact the co-ordinate branches of it — legislative, executive, judicial — alike. I am no convert to any doctrine of the omnipotence of Congress. . . .

CHAPTER LXI

JUDICIAL INTERPRETATION OF THE FOURTEENTH AMENDMENT

IN these notable cases, the Supreme Court was called upon to give an authoritative interpretation of the war amendments. Of the nationalizing tendency of the war, the Court was well aware; but it confessed to a great reluctance to obliterate the main features of the federal system. Believing that the Court had "always held with a steady and even hand the balance between State and Federal power," five of the nine judges agreed in giving a restrictive interpretation to the Fourteenth Amendment. The pertinent facts in the cases are stated in the opinion of the Court.

188. *Slaughter-House Cases*.¹

Mr. Justice MILLER delivered the opinion of the Court: —

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State. . . .

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the State courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the thirteenth and fourteenth articles of amendment of the Constitution of the United States. The jurisdiction and the duty of this court to review the judgment of the State court on those questions is clear and imperative.

The statute thus assailed as unconstitutional was passed March 8, 1869, and is entitled, "An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

¹ Supreme Court of the United States, 1873. 16 Wallace, 36.

The first section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined, or the keeping or establishing any slaughter-houses or abattoirs within those limits, except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The second section designates the incorporators, gives the name to the corporation, and confers on it the usual corporate powers.

The third and fourth sections authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and impose upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company for each steamboat and for each animal landed.

Section five orders the closing up of all other stock-landings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the State for that purpose. . . .

The power here exercised by the legislature of Louisiana is,

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in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may now be questioned in some of its details.

“Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all,” says Chancellor Kent, “be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.” This is called the police power; and it is declared by Chief Justice Shaw, that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. . . .

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise. . . .

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by

the act for this purpose are appropriate, are stringent, and effectual. . . .

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust. . . .

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the State, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars: —

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles. . . .

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument. . . .

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . .

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship — not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few

years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. . . .

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed. . . .

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. . . .

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption

that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." . . .

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase. . . .

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citi-

zens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State Governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citation of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States — such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? . . .

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States

as such, and that they are left to the State Governments for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so. . . .

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal Government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amend-

ment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment. . . .

The judgments of the Supreme Court of Louisiana in these cases are affirmed.

CHAPTER LXII

THE FIFTEENTH AMENDMENT

"THE groups of men favoring a suffrage amendment of some kind were, therefore, the politicians, who aimed at congressional control over Southern elections, the nationalists, who desired a strong central government, and the universal suffragists, or humanitarians, as they may be called, who were laboring to base the enjoyment of political rights upon no distinction less comprehensive than humanity itself. Over against all three of these, and opposed to a suffrage amendment of any kind, were the local autonomists, proud of local tradition and jealous of national interference in local affairs."¹ When finally formulated, therefore, the amendment was a resultant of these various forces. Two extracts have been made from the debates in Congress to indicate the main argument of the nationalists and the counter-argument of the local autonomists.

189. *Representative Shellabarger on the Proposed Fifteenth Amendment.*²

Now, Mr. Speaker, I will not proceed further to discuss this proposed substitute submitted by myself, but will beg such attention to it as members may be inclined to give it before we come to the vote. I did want to call attention to the reasons why we should now submit some amendment securing to all the citizens of the Republic a just participation in the election of its rulers. I regret that my time will not at all permit me to do this in any adequate way. One of these reasons is to be found in the fact that the proposition in itself is so eminently right that it cannot fail to commend itself to the approval, it seems to me, of all right-minded men. Right, I mean — in regard to its relations to the Constitution. The framers of the Constitution thought that they had so made that instrument that they deemed the provisions in regard to who should elect the Federal rulers were substantially unalterable by the States. They also deemed this regulation of the franchise, by

¹ Mathews, *Legislative and Judicial History of the Fifteenth Amendment*, 22.

² *Congressional Globe*, 40 Cong., 3 Sess., App., 98. January 29, 1869.

which the rulers and the laws of the Republic were to be made, one absolutely fundamental and going into the very essence of the Government, and one which could not be left to the States. This is not only one of those self-evident things about which there can be no debate, but it is so expressed, over and over, by those who made the Constitution. Mr. Hamilton says, (see *Federalist*, 403:)

“The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. To have submitted this to the legislative discretion of the States would have been improper, because it is fundamental, and for the additional reason that it would have rendered too dependent on the State governments that branch of the Federal Government which ought to be dependent on the people alone.”

He also says, speaking of the clause making electors the same as for the most numerous branch of the State Legislatures, that —

“It will be safe for the United States, because being fixed by the State constitutions it is not alterable by the State governments.”

But in speaking of the declaration by Mr. Hamilton that the Constitution's definition of the qualifications of Federal electors was “not alterable by the State governments,” Mr. Story says (1 Story on Constitution, section 586) “the provision has not in fact, and may not have, all the security against alteration so confidently affirmed.” Thus it is seen, first, that the makers of the Constitution did regard this power of defining the qualifications of Federal electors fundamental, and one which the Convention could not properly leave to the States; second, that they thought that as they had arranged it in the Constitution it was substantially “unalterable by the States;” and third, that their expectations as to this last have not been historically realized. This vital power of Government has turned out, in practice, to be one not only “alterable by the States,” but one which the States have so used as that in many of them the masses of the people who are loyal to their country and who have not gone into a stupendous rebellion for the

overthrow of the Government, could and would to-day be wholly deprived of all powers of government by the assumption of the elective franchise, by those alone who did engage in such rebellion. So startling a fact must impel us, by its irresistible forces, to go at once to the remedying of so grave a defect in the Constitution as that one is which leaves to the States, only and supremely, the matter of making both the rulers, and through these, the laws of the Republic.

Now, I appeal to the gentlemen upon the other side of the House, and on all sides, if I am not arguing the merest truism when I say that that Government is not a Government at all that has not in itself power to control the question as to who shall make the rulers of that Government, and which, for that very reason, has not in itself the power of either making or executing its own laws. It is fundamental, essential, as Mr. Hamilton said it was. Therefore I appeal to the other side of the House when I say that the thing is, in the philosophy of government and in logic, right. And it is therefore an amendment, in so far as it makes a Federal definition of Federal electorship, required by the plainest and most elementary principles of every free Government.

190. *Senator Doolittle on the Proposed Fifteenth Amendment.*¹

To define the precise line of demarcation between the powers granted and the powers reserved is a most difficult task — to mark in language the precise point where the powers of the State end, and the power of the Federal Government begins. But there are some powers so clearly defined that no man in his senses can be mistaken. Upon this great question, whether the power of the States over the question of suffrage is reserved to them or conferred upon the Federal Government by the Constitution, no sane man can doubt. And, sir, the wisdom of still reserving it to the States is so undoubted that even Mr. Hamilton, the representative of centralization, the incarnation of Federalism, was compelled to say that to put into the Constitution of the United States such a power in this Government

¹ *Congressional Globe*, 40 Cong., 3 Sess., App., 151. February 6, 1869.

to control the question of suffrage and elections in the States would be an engine calculated to destroy the governments of the States.

Mr. President, I do not make this statement at random. I have before me the language of Mr. Hamilton, in the fifty-ninth number of the *Federalist*, in which he puts this very case:

“Suppose an article had been introduced into the Constitution empowering the United States to regulate elections for the States, would any man have hesitated to condemn it both as an unwarrantable transposition of power and as a premeditated engine for the destruction of the State governments?”

And yet your proposed amendment does all that. Mr. President, it says that suffrage shall not be restricted on account of race, color, or previous condition, and that Congress shall have power to enforce it by appropriate legislation. Sir, the power to enforce it of necessity implies power over the election of the States. In order to give to the colored man of the States the right to vote at the elections in the States, to secure to his vote a fair count, and to make sure that if his vote be counted and determine the result that the person elected shall have the office, will draw to this Government the power to control the elections themselves. It is impossible to separate the two. But one authority can decide the result of an election. It must be the State authority or the Federal authority. As it reaches all elections, if the Federal authority is supreme, the State authority must succumb in all elections to Federal control. . . .

Mr. President, I maintain in the first place that the right to fix the qualifications of voters is essential to a republican form of government, and that any State which has not the right to fix and determine for itself who shall vote and who shall not vote ceases to be republican, for it loses the power to govern itself. If Congress can determine who shall vote in Indiana, Indiana no longer governs herself. If Illinois can determine who shall vote in Indiana, it is not the people of Indiana who govern themselves, but it is the people of Illinois who govern Indiana.

It cannot be too often repeated that it is absolutely essential to republican government that the State for itself shall have the power to fix the qualification of its voters. That clause in the Constitution to which the honorable Senator from Massachusetts so often appeals, "that the United States shall guaranty to each State a republican form of government," is in direct conflict with the proposed amendment, because republican government is self-government, and there can be no self-government in a State if any outside State or any other power above the control of the State can take away from the States the power to determine for themselves who shall exercise the right of suffrage in the States; for those who vote govern the State, and if an outside power determines who shall vote in a State that power governs the State. This is a proposition not to amend, but to revolutionize. It is not in the way of improving and upholding, but in the way of upturning the foundations of the system, and of destroying the very spirit which gives it life, the very ideas of which it was born, upon which it has lived, and without which our republican institutions in a country so vast and so diversified as ours cannot survive.

191. *The Fifteenth Amendment.*¹

ARTICLE XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

192. *Judicial Interpretation of the Fifteenth Amendment.*

. . . The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States or the United States, however, from giving preference, in this particular, to

¹ This amendment went into effect March 30, 1870. *Revised Statutes of the United States* (1878), 32.

one citizen of the United States over another on account of race, etc. Before its adoption, this could be done. . . . Now it cannot. If citizens of one race having certain qualifications are permitted to vote, those of another having the same qualifications must be. . . . It follows that the Amendment has invested the citizen of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. . . .

The power of Congress to legislate at all upon the subject of voting at State elections rests upon this Amendment. It cannot be contended that the Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only when the wrongful refusal at such an election is on account of race, etc., that Congress can interfere and provide for its punishment.¹ . . .

. . . The right of suffrage is not a necessary attribute of national citizenship; but exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.² . . .

¹ *United States v. Reese*. Supreme Court of the United States, 1876. 92 U. S. 214.

² *United States v. Cruikshank*. Supreme Court of the United States, 1876. 92 U. S. 542.

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